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P 25

CASES

OF

CONTROVERTED ELECTIONS,

IN THE

SECOND PARLIAMENT

OF

THE UNITED KINGDOM:

BEGUN AND HOLDEN 31 AUG. 1802.

By ROBERT HENRY PECKWELL,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOL. II. PART I.

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1806.

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IN conſequence of the general expectation that a diſſolution of the preſent Parliament will immediately take place, it has been thought adviſeable to publiſh ſeparately the firſt part of the ſecond volume of theſe reports. The ſecond part, which will complete the whole Work, will be publiſhed in the courſe of the preſent year.

Oct. 16. 1806.

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REPORTS OF CASES

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CONTROVERTED ELECTIONS.

CASE XXXII.

THE COUNTY OF MIDDLESEX.

The Committee was appointed on the 3d of February, 1804, and conſiſted of the following Members:

Viſc. Marſham, *Chairman.*
Sir Watkin Williams Wynn, Bart.
Peter Will. Baker, Eſq.
Hon. Montgomerie J. G. Stewart.
Cha. Cockerell, Eſq.
Rob. Sharpe Ainſlie, Eſq [a]
Cha. Steyart Hawthorne, Eſq.
John Atkyns Wright, Eſq.[b]
Sir David Carnegie, Bart.
Hon. Edw. Spencer Cowper.
Lord John Thynne.
John Penn Walſh, Eſq.[c]
Hon. Newton Fellowes.
Iſaac Hawkins Browne, Eſq. Nominee for the Petitioner.
Nicholſon Calvert, Eſq. appointed by the firſt 13. [d]

Petitioners: 1. William Mainwaring, Eſq. 2. Electors.
Sitting Member: Sir Francis Burdett, Bart.
Counſel for Mr. Mainwaring;
Mr. Piggott. Mr. Serjeant Lens. Mr. Courthope.
for the Electors: Mr. Garrow.
for the Sitting Member:
Mr. Plumer. Mr. C. Warren. Mr. Clifford.
for the Sheriff: Mr. Adam.

THE petition of Mr. Mainwaring [e] ſtated the candidates at the laſt election to have been, the petitioner, Sir Francis Burdett, Bart. and George Byng, Eſq.; that Sir

Petition of Mr. Mainwaring.

[a] Excuſed 7th July, on account of the death of a near relation.

[b] Excuſed 14th March, on account of indiſpoſition.

[c] Excuſed 28th February, on account of the death of a near relation.

[d] The ſitting member having waived his right to appoint a nominee. See St. 11 G. 3. c. 42. ſ. 6.; and St. 28 G. 3 c. 52. ſ. 15.

[e] Preſented 6th December, 1802; renewed 23d November, 1803.

William Rawlins, Knt. and Robert Albion Cox, Eſq. the ſheriff of the county, and returning officer, manifeſted great partiality in favour of Sir F. B., admitting many perſons to vote for him who had neither colour nor pretence to vote, refuſing to examine them, or to ſuffer them to be examined, reſpecting their right; and rejecting the votes of ſeveral perſons who tendered themſelves in favour of the petitioner: that the undue conduct of the ſaid ſheriff during the ſaid election was highly injurious to the petitioner, and to the rights of the real electors of the ſaid county; that the ſitting member had been guilty of bribery; and that, by theſe ſeveral means, he had obtained a colourable majority over the petitioner; and that "by the partiality and undue conduct of the ſaid ſheriff, acting as ſuch ſheriff and returning officer for the ſaid county of Middleſex," he had procured himſelf to be returned: whereas the petitioner had the legal majority, and ought to have been returned.

Petition of electors.

The petition of "the freeholders of the county of Middleſex[f]" charged the ſitting member, Sir F. Burdett, with bribery, and treating.

Opening.

On the 4th of February, Mr. Piggott made a general opening of the caſe of Mr. Mainwaring, the petitioner. It conſiſted, 1. Of a charge againſt the ſheriff[g], of groſs miſconduct, and partiality: 2. A claim to the majority of votes, founded upon objections of various ſorts, made to no leſs than 2196 votes for the ſitting member: 3. Bribery. After which 21 poll books were put in by the clerk to the clerk of the peace for the county of Middleſex, who depoſed that he had received them from the ſheriffs, and that they had been in his cuſtody ever ſince. The numbers were for Mr. Byng 3848; Sir Francis Burdett 3207: Mr. Mainwaring 2936: Majority of Sir F. B. over Mr. M. 271. The poll laſted during fifteen days, beginning July 13, 1802.

Poll-books.

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caſe: 1. As to the miſconduct of the ſheriffs: 2. As to 372 voters who had named as their freehold a ſhare in the Good-intent mill, and who were ſaid in fact to have voted for a ſmall parcel of land in Iſleworth upon which a mill called the Good-intent mill was intended to be built; and whoſe votes were, as he contended, notoriouſly bad, and were received in ſuch circumſtances as to attach the greateſt blame upon the returning officer: he ſubmitted, that ſhould this claſs of votes be proved to be bad, the majority being turned in favour of his client, the committee would then call for an anſwer to that part of the caſe from the other ſide. 3. He propoſed, if neceſſary, to diſqualify a large number of voters who were not properly aſſeſſed to the land tax; and, if a ſufficient majority ſhould not be eſtabliſhed by thoſe means, in the next place to have recourſe to other heads of objection: 4. If he failed in proving that his client was entitled to the ſeat, he propoſed to prove the charge of bribery againſt the ſitting member. And he obſerved that there would ſtill remain the petition of the freeholders to be tried, which contained an allegation of treating; and which might be entered upon, if the event of the trial of the preſent petition ſhould render it neceſſary to reſort to that charge. The counſel for the ſitting member objected to this plan; inſiſting, firſt, that it was incumbent on the petitioner to lay his whole caſe before the committee, before their client was called upon to anſwer any part of it: ſecondly, that as the petitioning freeholders were evidently in the intereſt of the petitioning candidate, their caſe, according to the general practice, ought to have been opened at the ſame time with his: and that the committee would not permit petitioners, by availing themſelves of this formal diſtinction, to multiply caſes, and parties, before them: laſtly, they propoſed to ſhew that the petitioning freeholders had no right to be heard before the committee, their petition not being ſuch as could be proceeded upon, according to law [b]. After ſome diſcuſſion it was agreed, that the queſtion as to dividing the caſe ſhould be deferred till the

Objected to by the ſitting member.

[b] See caſe of Caermarthenſhire, Note (A) vol. i. p. 294.

evidence againſt the ſheriffs was gone through; that Mr. Mainwaring ſhould prove his majority of votes, before he offered any evidence of bribery againſt Sir F. Burdett: and that all the queſtions reſpecting the petition of the freeholders ſhould be reſerved, without prejudice to the petitioners, till it ſhould appear, from the courſe of the preſent trial, whether or not it would be neceſſary to diſcuſs it.

Evidence of ſheriffs' miſconduct.

The firſt witneſs, Mr. John Adolphus, called on the part of the petitioner, began his evidence by giving an account of ſome tumultuous proceedings which had taken place during the poll, and of certain ſcandalous and indecent exhibitions, and inſulting ſpeeches directed againſt Mr. Mainwaring, which had been permitted by the ſheriffs, in their preſence, and in the front of the huſtings.

Objection to evidence of facts not alleged in the petition.

Mr. Adam, as counſel for the ſheriffs, upon Mr. Piggott's ſtating theſe facts in the opening of his caſe, had declared his intention to reſiſt the right of the petitioner to prove them as a part of the charge againſt his clients, inaſmuch as they had not been ſtated in the petition: and he now contended, that it contained no allegation under which this evidence could be introduced; that as in all courts of juſtice, trials muſt proceed *ſecundum allegata & probata*, ſo moſt eſpecially in this, where not only by the oath of the members of the committee, but by the very frame and conſtitution of their juriſdiction, their powers were limited by the terms of the petition, and extended no further than to the matters contained therein: that, indeed, the petitioner had complained of the "undue conduct of the ſheriff," as injurious to him; but that from the antecedent part of his petition, it plainly appeared that theſe words were only referable to the improper admiſſion, and rejection of votes; and that nothing was charged reſpecting any violence which had been ſuffered to be committed at the huſtings, or reſpecting any perſonal inſults offered to the petitioner, which the ſheriffs had connived at, or which they had neglected to ſuppreſs: he adverted to the caſe of Nottingham [1], where the criminal conduct of the returning officer being the ſub-

[1] Ante, vol. i. p. 77.

ject

jeƈt of the petitioner's complaint, had been diſtinƈtly ſtated in his petition; and to the caſe of Oxfordſhire, 1754[k], where the petitioners, Lord Wenman and Sir J. Daſhwood, ſpecifically alleged the particular grounds upon which they demanded a cenſure upon the ſheriff. It was anſwered by the counſel for the petitioner, that according to the form of petitions univerſally adopted, and by the law and cuſtom of parliament, it had always been held, that a general allegation of miſconduƈt let in the proof of particular inſtances; that it was merely ſufficient to ſtate the charge; but it was not neceſſary to ſpecify the evidence, or the particulars facts intended to be proved, in order to eſtabliſh that charge; it was needleſs to cite inſtances[l], where particular aƈts of corruption had been given in evidence under the general allegation of bribery, or treating; or where ſpecific inſtances of the miſconduƈt of returning officers had been proved, although their partiality had been ſtated in the moſt general terms. In the caſes cited on the other ſide, perhaps more preciſion had been uſed by the petitioners than was neceſſary: but there was a diſtinƈtion between them and the preſent; for in one of them, the petition was not directed againſt the conduƈt of the ſheriff during the eleƈtion, but againſt his conduƈt afterwards: and in the other, the miſconduƈt of the returning officer was complained of, not as having deprived the petitioner of the majority of votes, but as having deprived him of his eleƈtion and return without oppoſition: or, ſecondly, as the ground of a void eleƈtion: whereas here, the petitioner complained that the ſitting member had obtained a colourable majority of votes by means of the partiality and undue conduƈt of the ſheriffs. Nothing, therefore, could be ſaid to fall more properly within the terms of the petition, than the evidence now offered, tending to ſhew by what aƈts, and by what criminal ſupineneſs and neglect, their partiality was manifeſted. Anſwer.

The committee decided, that the examination ſhould proceed. Deciſion.

[k] 27 Jour. 17, 18. [l] See the caſe of Cricklade, 2 Lud. 323.

Evidence againſt ſheriffs.

Hereupon Mr. Adolphus continued his narration, and was followed by ſeveral other witneſſes, who deſcribed the manner in which the election had been conducted.

This evidence is omitted here; ſince it would be tedious to give it in detail; and, on the other hand, it would be a delicate and invidious taſk to attempt any general account of tranſactions, in which the character and honour of ſeveral individuals were deeply concerned, and brought in queſtion. The minutes of the committee, relating to this part of the caſe, were afterwards printed by order of the Houſe.

The report of the committee upon the conduct of the ſheriffs will therefore be preſented to the reader, as containing a ſufficient outline of their caſe to enable him to underſtand as well the nature of the charge proved againſt them, as the ground of their defence; although (as he will obſerve) the committee were of opinion, not only that their defence was inſufficient, but that the foundation of it totally failed, inaſmuch as their conduct had not been conſiſtent with their own principles.

Diſcuſſion of further courſe of proceeding.

The evidence againſt the ſheriffs occupied the time of the committee from Feb. 6 to Feb. 15: the abſence of Mr. Walſh, one of their members, prevented their ſitting on the 9th. On the 14th, this part of the petitioner's caſe being cloſed, and Mr. Piggott having given evidence to diſqualify the 372 perſons called Mill-voters, whoſe caſe will be related in the ſequel, propoſed, that the committee ſhould call upon the ſheriffs for an anſwer to what had already been proved; and then, ſhould either report the petitioner entitled to the return [m], or ſhould call upon the ſitting member to remove, if he could, the majority now obtained over him. This

[m] It is proper here to mention, that the following requiſition was proved to have been delivered on the part of the petitioner, to the ſheriffs, at the election, on the fifteenth day:—"The ſheriffs being ſworn to return, as knights to repreſent the county of Middleſex in Parliament, ſuch perſons as ſhall to the beſt of their judgments appear to them to have the majority of *legal* votes; and it being within their own knowledge, from the teſtimony of many of a certain claſs of perſons claiming to vote in right of a mill, called in the poll-books, the Good-intent, and ſituate at Iſleworth, that the perſons who have polled in right of the ſaid mill had not even the ſemblance of ſuch franchiſe; it is therefore confidently expected, and I demand in my own name, and in the name

This propoſal was ſtrongly reſiſted on the part of the ſitting member; and the queſtion, Whether or not the caſe ſhould be ſo divided, was argued on the 15th of February, by two counſel on each ſide. It was agreed that, for the purpoſe of the argument, the 372 mill-voters ſhould be taken not to be duly aſſeſſed to the land-tax. The counſel for the petitioner inſiſted upon a ſeparate deciſion upon the caſe as it now ſtood, and reaſoned from the juſtice and the convenience of ſuch a mode of proceeding; and from the particular nature of the caſe. They ſaid, that they had already proved the ſheriffs to have been guilty of great miſconduct; and, among other inſtances of breach of duty, to have received the votes of 372 perſons, all in ſimilar circumſtances, and conſtituting a diſtinct claſs of pretended voters, whom they well knew not to have the leaſt colour or pretext for claiming a right to vote: that in the admiſſion of theſe perſons conſiſted the moſt ſerious injury which the petitioner had ſuſtained, and the moſt prominent part of the fraud and guilt of the ſheriffs; but that fraud would become ſucceſsful, and that injury much aggravated, if no redreſs could be obtained, till a very long and expenſive ſcrutiny had been gone through. It was ſuggeſted, that if the committee were of opinion that the petitioner had been prevented from obtaining his return by a ſhameful conſpiracy, to the ſucceſs of which the returning officers had lent themſelves and their whole authority, they would in the firſt inſtance reſtore him to that ſituation of which he had been thus deprived, and give him the ſeat immediately; leaving it to Sir F. Burdett to petition, if he thought fit. But if they were unwilling to grant this, at leaſt they would call for an

Queſtion on dividing the caſe.

Argument for the diviſion.

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name of the freeholders of the county of Middleſex, that the ſheriffs will act conſiſtently with the oath they have taken, and not add the perſons who have polled as pretended owners of the ſaid mill, to the number of real freeholders polled in the courſe of this preſent election, and thereby deprive the real freeholders of one of their moſt invaluable privileges, but that the ſheriffs will return ſuch perſons as knights to ſerve in Parliament for the county of Middleſex as ſhall appear by the poll-books to have a majority of *legal* votes, independently of the fictitious votes polled in right of the ſaid mill."

anſwer to the caſe as it ſtood at preſent, ſince, upon the evidence already offered, it appeared that the petitioner had proved his right to have been returned: that this would produce no inconvenience to any of the parties, but on the contrary, might ſave a great deal of trouble, litigation, expence, and loſs of time. That it was particularly the intereſt of the ſheriffs to have their caſe diſpoſed of without delay: if they ſhould prove innocent, it was beſt that their innocence ſhould be ſpeedily declared: but in any event, it would be much to their advantage to be relieved, by the deciſion of the committee, from their further attendance at a trial, in a great part of which they might have no concern. They further ſubmitted, that the meaſure propoſed, was juſtified by the common practice of committees, who frequently decide ſeparately upon the ſeparate points of a caſe, where it appears that ſuch a courſe will conduce to the attainment of juſtice, the expedition of the trial, or the convenience of the parties[n]. It was admitted that the committees, who firſt ſate after the paſſing of the Grenville act, uſed moſt frequently to hear the whole of the caſe before they came to a determination upon any part of it; but it was ſaid, that time and experience having contributed no leſs to the improvement of this judicature, than the ſtatutes which had been at various times paſſed for that purpoſe, committees had learnt from the conveniency of the practice, to proceed by ſteps, and not to embarraſs themſelves by a confuſed view of many different queſtions ſubmitted to them at the ſame time. The caſes cited were thoſe of Bedfordſhire, 1785[o], where the committee reſolved to diſcuſs the caſes of each hundred ſeparately, notwithſtanding the oppoſition of the ſitting member; the caſe of Cricklade, 1785[p], where the caſe of the petitioner had been ſplit ſo as to ſuit the nature of it; of Cirenceſter, 1792[q], where the counſel on one ſide had been obliged, againſt their will, to argue certain general queſtions; of Great Grimſby in the laſt ſeſſion, where, contrary to his earneſt remonſtrance[r], the committee directed Mr. Plumer

[n] See 2 Lud. 336.
[o] 2 Lud. 381. 386. 388.
[p] 2 Lud. 350.
[q] *Quære.* See 2 Fra. 448.
[r] Ante, p. 64. This was a miſtake. Mr. Plumer reſiſted at firſt, but afterwards

Plumer to argue an abſtract propoſition; and the caſe of Chippenham, in the ſame ſeſſion [a], where the ſame courſe was purſued. It was difficult to draw any analogy between theſe proceedings and thoſe of the courts of common law, ſince here, the petitioner might include any number of different complaints in his petition; there, the plaintiff muſt bring different actions: but it was ſaid that even in courts of law, where a number of different iſſues were made upon the pleadings, it was by no means unuſual for the judge to aſk the opinion of the jury upon each ſeparately.

On the part of the ſitting member, the ſuggeſtion, that the committee would return the petitioner as duly elected, upon the evidence as it ſtood at preſent, was treated as extraordinary and abſurd; ſince it was the ſworn duty of the committee to hear the whole of the caſe: and ſince it was unqueſtionably competent to the ſitting member, either to deſtroy the majority apparently obtained by his antagoniſt, or to ſhew, that he was perſonally diſqualified to ſit. That moreover, the conſtant practice in all courts of juſtice, was firſt to hear the whole caſe of the plaintiff throughout, unleſs a different plan was adopted for the convenience of the parties, and by their mutual agreement. That to divide this caſe, would be to introduce infinite perplexity and inconvenience. It was denied, that theſe 372 perſons conſtituted a diſtinct claſs: becauſe admitting them to be bad votes, by reaſon of having no freehold, or by reaſon of their not having been duly aſſeſſed to the land-tax, all perſons ſtanding in the ſame ſituation belonged to that claſs. But admitting them to conſtitute a ſeparate claſs; could it be contended, that to diſcuſs each claſs ſeparately would ſave time? On the contrary, it was evident that the ſeparation of the claſſes muſt neceſſarily multiply ſpeeches, and divide one cauſe into many. Beſides, the petitioner had obtained all the advantage likely to ariſe in his favour, from the effect of a general opening of his caſe moſt ably and powerfully made by his counſel; was the ſitting member to be called upon under this diſad- Argument *contrà*.

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wards agreed to argue the propoſition, upon condition that he was allowed to frame it himſelf.

[a] Ante, p. 273.

vantage,

vantage, to give a partial anſwer, without having on his part an opportunity of removing the prejudices raiſed againſt him, and of inſiſting upon the general merits of his caſe? As to the authorities cited, they were ſaid not to apply to the preſent queſtion. In the caſe of Bedfordſhire, the committee firſt took all the votes objected to in each hundred ſeparately: which was rather a convenient arrangement, than a diviſion of the caſe; and even there, they left it open to themſelves to repeal that arrangement, if it ſhould be found inconvenient to the ſitting member[t]: and yet this authority was over-ruled by the caſe of Buckinghamſhire[u] which happened afterwards, and in which the committee decided the ſame queſtion differently; and obliged the petitioner to go through his whole caſe. In the caſe of Cricklade, the only queſtion was, on whom the burden of proof lay, as to the voters alleged by the petitioner to have been illegally received; that is, whether the petitioner had eſtabliſhed ſuch a charge of fraud and connivance againſt the returning officer, as to make it incumbent upon the ſitting member to ſupport the votes which had been received by him; or whether, as in the common caſe, the defects of their titles were to be ſhewn by thoſe who impeached them. In the caſe of Great Grimſby the abſtract propoſition was framed, and argued by conſent: and although, in thoſe of Cirenceſter and Chippenham the general queſtions were diſcuſſed, according to the directions of the committee, againſt the conſent of one of the parties; yet it muſt be remembered, that the diſcuſſion of abſtract propoſitions differs exceedingly from the deciſion of ſeparate ſubjects of evidence; for the former imports a diſputed point of law, the determination of which may affect the admiſſion of particular evidence, and render it material or immaterial; it may therefore frequently become neceſſary to eſtabliſh the principle of law, before the facts of the caſe are inveſtigated. The Glouceſterſhire committee required of the petitioner to go through the whole of his caſe, before the ſitting member began his defence.

[t] 2 Lud. 388, 9.

[u] 2 Lud. 600.

On

On the part of the ſheriffs it was ſaid, that as they had been charged with partiality and improper conduct throughout the whole of the election, they could not be called upon for their defence till the whole of the evidence for the petitioner had been gone through, ſince it was plain that there was no part of it which might not in ſome degree affect them.

The committee decided, "That they will not now decide upon the mill votes, and the conduct of the ſheriffs[v]." Deciſion.

Feb. 16. Several plans were then propoſed for a meeting of the agents on both ſides for the purpoſe of comparing the poll with the books of the aſſeſſment of the land-tax, and of extracting the names of ſuch perſons as did not appear to be aſſeſſed; but it happened that no propoſal made on one ſide proved to be agreeable to the oppoſite party: at length the counſel for the petitioner in the regular courſe of the cauſe, gave in evidence 172 atteſted copies of the land-tax aſſeſſments for the county of Middleſex, and called Mr. John Ellis, who depoſed that he had examined and compared the names and deſcriptions of the voters for the ſitting member from an atteſted copy of the poll procured from the clerk of the peace, with the ſaid aſſeſſments, and that the liſt[w] which he delivered in contained the names of all ſuch as were not found to be rated and aſſeſſed, according to the deſcription which they had given of themſelves at the poll. The number was 1523[x]. The counſel for the petitioner then declared, that this was the whole of the evidence which they meant to produce upon the ſubject of the majority of votes; and they offered either to proceed to give evidence of bribery according to the allegation of Mr. Mainwaring, or Further proceedings. Evidence. Land-tax aſſeſſments, compared with poll.

[v] See ſome of the caſes in which a ſimilar queſtion has occurred, poſt. note (A).

[w] The ſame courſe was purſued by the counſel for the ſitting member, when he entered upon his caſe. A name of a voter who had been objected to on the ground of non-aſſeſſment in the liſt of objections, appearing to be omitted in the compared liſt given in upon oath before the committee, the objection was not ſuffered to be entered into. Vote of James Croſs, Apr. 19.

[x] The mill voters were compriſed in this number. This liſt compriſed thoſe who were not aſſeſſed both in the names of landlord and tenant, though it was afterwards admitted, that a proper aſſeſſment of either was ſufficient.

to

to diſcuſs the queſtion reſpecting the petition of the freeholders, and alſo to enter upon the ſubjects both of bribery and treating. But the committee ſuggeſted, that in over-ruling the firſt propoſal of the petitioner to divide the caſe, they did not wiſh it to be underſtood that they had determined not to call on the ſitting member for his defence till all the charges of the petition had been gone through; that, on the contrary, the preſent ſeemed to be the ſtage of the cauſe in which the petitioner might properly make a ſtand; ſince, unleſs the ſitting member could overcome the majority obtained over him, the diſcuſſion of the remaining allegations of the petition would be nugatory. Upon this, the petitioner, profeſſing now to have cloſed his caſe as far as related to the conduct of the ſheriffs and the majority of votes, deſired that the ſheriffs and the ſitting member might be called upon for their defence reſpecting thoſe charges; reſerving to themſelves, the right of proceeding to the charge of bribery, if it ſhould become neceſſary: and to the petitioning freeholders, their right to be heard as to the ſufficiency of their petition, and as to the proof of the charges contained therein. The counſel for the ſitting member, and for the ſheriffs, after a little heſitation, ſubmitted to this arrangement, and the order of proceeding was ſettled accordingly. The following entry was made in the minutes: "The petitioner having now cloſed his caſe as far as relates to the conduct of the ſheriffs, or the legality of votes, deſires that the ſitting member and the ſheriffs may be called upon for their defence; reſerving the queſtion of the right of the freeholders of Middleſex to be heard upon their petition, and all other queſtions on both ſides relating to bribery or treating, and the conſequences thereof. This propoſition, made by the counſel for the petitioner, being acceded to by the counſel for the ſitting member and the counſel for the ſheriffs, the committee determine to proceed accordingly."

On the 17th Feb. Mr. Adam applied to the committee for further time to examine the evidence which had been offered againſt the ſheriffs, and it was agreed, that he ſhould not be called upon for their defence till the Monday following, Feb. 20.

On

On the 18th Mr. Serjt. Lens ſummed up the evidence on the part of the petitioner. His obſervations were chiefly directed againſt the conduct of the ſheriffs; eſpecially againſt that part of it which related to the admiſſion of the mill voters. He argued, that whatever doubts there might be in the minds of ſome perſons, whether the nature of the office of a returning officer were judicial or miniſterial, it was plain from the conduct of the preſent ſheriffs, both before and after the admiſſion of the mill voters, that they conſidered themſelves as inveſted with ſufficient powers to inveſtigate and reject the claims of perſons who tendered their votes, notwithſtanding the offer of ſuch perſons to take the freeholder's oath. The reader will perceive that the committee in their report to the Houſe, adopted theſe opinions. As the arguments were ſuggeſted by the particular facts of the caſe, they do not form part of the proper ſubject of theſe reports. But the queſtion, whether in point of law the returning officer preſiding at an election be a judicial or a miniſterial officer, is of ſo great importance, that the reporter is induced to give the ſubſtance of the ſpeeches of Mr. Serjt. Lens on one ſide, and of Mr. Adam on the other, as far as they related to that ſubject; the reader being again advertiſed, that the former did not dwell much upon the ſubject; the chief ſcope of his addreſs being directed to the palpable miſconduct of the ſheriffs under any view of the caſe, and to ſhew that they had exerted, and abuſed, all the functions that can be ſuppoſed to belong either to a miniſter, or to a judge. He inſiſted however that the main pillar of the freedom of election, is the judicial power of the officer who preſides at it. Unleſs he is inveſted by the law with ſuch a power, it is a mockery, to give the name of an election to the numbering of the votes of perſons of any particular deſcription; ſince in that caſe there is no mode of excluding any who will ſwear themſelves to be of that deſcription, and conſequently falſehood and perjury muſt always be ſucceſsful. By ſtat. 2 G. 2. c. 24. ſ. 3. the returning officer is directed, immediately after reading the writ, to take an oath to return ſuch perſons as ſhall, to the beſt of his *judgment*, appear to him to have the majority of legal votes. It therefore appears that he is

Petitioner's caſe ſummed up.

Argument, that the ſheriff is a judicial officer.

St. 2 G. 2. c. 24.

to

to decide by his judgment, to whom the majority of legal votes belongs; and how can he do that, unleſs he may alſo decide, by the ſame judgment, the legality of particular votes? This oath is otherwiſe a ſnare to the returning officer; and the terms of it are impoſſible to be fulfilled. A ſcrutiny is a reviſion of the poll; it exiſted at common law, and was nothing elſe but a more deliberate exerciſe of the judgment of the returning officer, upon the votes already received, in order to enable him with greater certainty to declare, who had the majority of votes. At common law, the powers of a ſheriff during the ſcrutiny, were preciſely the ſame as during the poll; but will it be contended that during the ſcrutiny he did not exerciſe a judicial capacity, and judicial powers? The ſtatutes which regulate ſcrutinies, have introduced no new principle in this reſpect; they have only furniſhed directions for the mode of proceeding, and have given the returning officer authority (which before he had not) to adminiſter an oath to ſuch as will take it [y]. To theſe authorities may be added the very deciſive and weighty opinion of Mr. Juſt. Blackſtone, who deſcribes the office of a ſheriff at elections, in theſe emphatical words:

Scrutiny.

"We ſhall find it of the utmoſt importance to have the ſheriff appointed according to law, when we conſider his power, and duty. Theſe are, either as a judge; as the keeper of the king's peace; as a miniſterial officer of the ſuperior courts of juſtice; or as the king's bailiff.

"In his judicial capacity he is to hear and determine all cauſes of 40*s.* value and under, in his county court, of which more in its proper place; and he has alſo a judicial power in divers other civil caſes. He is likewiſe to decide the elections of knights of the ſhire (ſubject to the controul of the Houſe of Commons), of coroners, and of verderors; to judge of the qualifications of voters, and to return ſuch as he ſhall determine to be duly elected [z]."

An eminent modern writer (Mr. Serjt. Heywood) has indeed expreſſed a different opinion; and has not only contended that a ſheriff is no judge, within the ſenſe of the word

[y] Stat. 25 G. 3. c. 84. ſ. 6. [z] Com. 1 vol. p. 343.

as uſed in the caſe of Aſhby *v.* White, where the queſtion was whether he might be ſued for refuſing a vote; but has even adopted the opinion, that he may not judge of the legality of the votes tendered to him, but is obliged to admit any perſon to poll, who will take the oath preſcribed by the law. The learned author ſtates [a] ſeveral inconveniences which he ſays may reſult from a power being permitted to the ſheriff to reject a voter who profeſſes himſelf ready to take the freeholders' oath: but, ſurely, the inconveniences flowing from the contrary doctrine are infinitely greater. Fraud and perjury in every ſhape muſt be the certain conſequence of an uncontrolled admiſſion of perſons who preſent themſelves. There is, beſides, the greateſt injuſtice and inconvenience, in compelling the returning officer to take an oath, which the law forbids him to keep; for, according to this argument, a returning officer, ſworn to make a return "according to his *judgment*, of him who ſhall have the majority of *legal* votes," is, notwithſtanding, *miniſterially* bound to return him, who, to his certain knowledge, owes his majority to the ſuffrages of perſons who have ſupplied the want of every legal qualification by a falſe oath. The queſtion in the caſe of Aſhby *v.* White was, Whether the ſheriff had a judicial character, to defend him from an action at law? not, whether he had a judicial power to diſtinguiſh a real elector from a pretender.

Feb. 20. Mr. Adam, in his defence of the ſheriffs, entered very much at large into the nature of their office, and the powers belonging to it, which he contended to be purely miniſterial; and that the idea of a judicial authority could be in no reſpect combined with the adminiſtration of their functions: that the only judgment they could exerciſe, was ſuch a judgment as was required of the loweſt officer to whom the law had committed the execution of any writ or other proceſs; the uſe of the word in ſuch caſes rather implying the operation of the intellect in the performance of a particular duty, than the ſentence of a conſtituted judge. He ſubmitted, in the outſet of his argument, the following

Defence of the ſheriffs.

Judgment defined.

[a] 1 Vol. p. 322.

propoſition

Propoſition reſpecting the power of the returning officer.

propoſition to the committee, as the foundation of the defence of his clients: "The power of the ſheriff, as returning officer, is a bounded, limited power, without the means of inquiry, having neither place, time, circumſtance, or authority for inquiry, from the neceſſity of the caſe reſting on the beſt evidence the thing will admit of; namely, on what the voter ſwears or what he ſays, which the ſtatute (in this caſe) poſitively reſtricts to what he ſwears." He ſupported this propoſition by the following arguments: The duty of a returning officer is only co-extenſive with his power; and his reſponſibility, with his duty. It has been attempted, on the other ſide, to extend both his duty, and his reſponſibility, beyond his power. The beſt way to determine what is required of him, is firſt to conſider what he has authority to do. The counſel for the petitioner has chiefly relied upon the paſſage quoted from Mr. J. Blackſtone, who cites, as the only confirmation of his poſition, Dalton's Office of Sheriffs, cap. 4. p. 25., where ſeveral inſtances are mentioned, of a judicial power being committed to the ſheriff, as of holding pleas, &c. and in p. 35. it is ſaid, "alſo in chooſing knights for the parliament, the ſheriff by the ſtatute (to ſome purpoſes) is made a judge, ſc. to examine, and to judge of the ability of ſuch as be chooſers of thoſe knights [b];" but it is ſubmitted that the word 'judge' in this paſſage is to be conſidered as implying a diſcriminating faculty of the mind, and not an exerciſe of judicial power; ſince neither Mr. J. Blackſtone, nor Dalton, afford any further information, as to the authority which this officer has to examine, or as to the proceſs by which he may cite perſons to appear before him, compel them to give evidence, or propoſe a teſt for the truth of it. They could not ſuppoſe a judicial authority veſted in a perſon, who was not in poſſeſſion of any facts upon which to form his judgment, or of the means of collecting thoſe facts. It alſo appears from Dalton, that the ſheriff executes the office by virtue of a ſpecial mandate from the king. Now the diſtinction between miniſterial

Argument, that the ſheriff is miniſterial.

Authorities.

[b] See alſo p. 333. "And ſo, the ſheriff is here made a judge in this caſe, ſc. to examine and judge of the ability of theſe chooſers of knights for the parliament." Stat. 8 H. 6. & 10 H. 6.

and judicial powers is this; that the latter are inherent in the office; the former are ſet in motion by a ſpecial mandate; as a writ, &c. Here, the ſheriff acts in obedience to a ſpecial mandate [c], and is therefore miniſterial. Mr. J. Blackſtone does not ſeem deeply to have inveſtigated this ſubject, but follows Dalton as his guide. Lord Ch. B. Comyns, among the inſtances of the miniſterial duties of the ſheriff, mentions his authority "in election of knights and burgeſſes for parliament, coroners, and verderors [d]." This opinion appears to have been built upon the judgment of Lord Ch. J. Holt in the great cauſe of Aſhby *v.* White [e], and upon that of the Houſe of Peers, by whom the doctrine of Lord Holt was ſuſtained. That great judge, after having mainly reſted his opinion as to the competency of the plaintiff to ſuſtain his action upon the miniſterial nature of the ſheriff's authority, urges the ſame conſideration in the report of the judgment of the Lords, which is ſaid to have been drawn up by him: it is there aſſerted; "That the officer

[c] Vid. ſtat. 7 & 8 W. 3. c. 25. ſ. 1. Dalton, in p. 33 mentions many inſtances where the ſheriff acts judicially in the execution of a ſpecial mandate: as of the writ of waſte, *nativo habendo*, re-diſſeiſin, &c, and ſee the whole of cap. 4.

[d] Tit. Viſcount, C. 4. and ſee Buller's *Niſi Prius*, p. 64 where it is ſaid, that an action upon the caſe lies "for wilful miſbehaviour in a miniſterial office, by which the party is damnified."—"So, for refuſing to take his vote at an election."

[e] 2 Ld. Raym. 950; and ſee 8 St. Tr. 139. The reader however will find in the whole of the arguments on each ſide, throughout the proceedings in that caſe, that it is taken for granted, that the returning officer has a right, and is bound to reject the votes of ſuch as he holds not to be electors; and in the courſe of the debates in the Houſe of Commons upon the petition of Mr. Fox againſt the conduct of the high bailiff of Weſtminſter in 1784, it was admitted on all ſides, and frequently taken as the foundation of the argument, that the power of the returning officer in taking the poll, is judicial, and in declaring the numbers, miniſterial. See Parliamentary Debates by Debrett, vol. xv. pp. 11. 92. 116. The following paſſage in the ſame report of the Lords committees, in Aſhby *v.* White, affords a very clear and ſafe rule for his conduct; "nor is there any danger to an honeſt returning officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes uſe of the beſt means to be informed, and it is plain his miſtake aroſe from the difficulty of the caſe, and not from any malicious or partial deſign, no jury will find an officer guilty in ſuch a caſe, nor can any court direct them to do it; for it is the fraud and the malice, which entitles the party to the action." Ibid. p. 129. it proceeds; "in this caſe, the defendants knew the plaintiff to be a burgeſs, St. Tr. *loc. cit.*

officer is only miniſterial in this caſe, and not a judge, not acting in a judicial capacity, is moſt plain; his buſineſs is only to execute the precept, to aſſemble the electors, to make the election, by receiving their votes, computing their numbers, declaring the election, and returning the perſons elected; the ſheriff, or other officer of a borough, is put to no difficulty in this caſe, but what is abſolutely neceſſary in all caſes. If an execution be againſt a man's goods, the ſheriff muſt, at his peril, take notice what goods a man has."

The reſult of theſe authorities is, that the nature of the office of ſheriff, in making returns to parliament, is miniſterial, and not judicial[f]; it remains in the next place to enquire, whether or not the ſame reſult may be collected from ſeveral ſtatutes that have been paſſed, relating to the ſame ſubject.

Statutes.

It has been ſaid on the part of the petitioner, that the word judgment, uſed in the oath required by ſt. 2 G. 2. c. 24. to be taken by every returning officer, ſhews the office to be judicial; but it is ſubmitted, firſt (as has been already obſerved), that this word judgment can only be underſtood to imply fidelity and integrity in the diſcharge of a miniſterial duty; ſecondly, that the engagement entered into, is to be conſtrued with reference to the means and powers which the returning officer poſſeſſes to fulfil it: if theſe means are inadequate, and theſe powers inſufficient, a ſtrict performance of it can neither be demanded by the moral duty which attaches itſelf upon an oath, nor by the law, which requires of no man what is impoſſible. Therefore, neither the mere admiſſion of an illegal vote, nor conſequently the return of a candidate unduly elected, of itſelf conſtitutes a crime. And this further appears from the frequent inſtances which occur, of returns being amended in favour of petitioners, and of votes being ſtruck from the

St. 2 G. 2. c. 24.

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a burgeſs, and yet fraudulently and maliciouſly hindered him from his right of voting; and juſtice muſt require that ſuch an obſtinate and unjuſt *miniſterial* officer ſhould not eſcape with indemnity."

[f] See alſo 1 Whitel. 332. 351 cited 1 Heyw. 4. 309.

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poll by committees, without any blame being imputed to the returning officer. What then are the means given by the law for trying the qualifications of a voter? the oath of the voter; and none elſe. This teſt, as far as concerns the value of the freehold, was firſt allowed to be adminiſtered by the ſheriff, by ſt. 8 H. 6. c. 7 [e]. It is to be obſerved that this act gives him no authority to adminiſter an oath to other perſons, for the purpoſe of contradicting, or of confirming the voter in his oath; neither has he any power, at common law or otherwiſe, to examine witneſſes, or receive evidence *aliunde*, in any way whatever. As for his own perſonal knowledge of the electors, their numbers have long ſince rendered that method of diſtinguiſhing them abſolutely impoſſible. Three things may therefore be collected from the enactment of the ſt. 8 H. 6.; firſt, that the office is not judicial; ſince it would be abſurd to call that power judicial, which conſiſts, not in iſſuing proceſs, examining witneſſes, hearing the arguments of litigant parties, or inveſtigating the true ſtate of the facts, but ſimply in receiving the oath of the party himſelf: ſecondly, that the only means which the ſheriff poſſeſſes, to try the qualification of the voter, is his oath: and, thirdly, that if the voter will ſwear himſelf duly qualified, the ſheriff is bound to receive his vote; for even if he had the power to receive the evidence of others upon oath, to diſprove what the voter had ſworn, it would be his duty to believe him, till he was contradicted, not by an equal balance of oppoſite teſtimony, but by ſtronger evidence: how much leſs juſt then, would it be, to ſuffer the ſimple aſſertion of any number of byſtanders, and voluntary witneſſes, to prevail over an oath ſolemnly taken, and at the riſque of ſuch perilous conſequences? Admitting, therefore, that before this ſtatute, the ſheriff was at liberty to oppoſe to the account given of himſelf by the elector, ſuch information as he might receive from others, and to decide accordingly, the ſtatute has taken away that diſcretion, by referring him to the teſt of the

St. 8 H. 6. c. 7.

[e] "And every ſheriff of the realm of England, ſhall have power by the ſaid authority, to examine upon the Evangeliſts every ſuch chooſer, how much he may expend by the year."

elector's oath. It is always to be remembered, that this concluſion is drawn with the exception of ſuch caſes as are from the nature of them palpably and evidently abſurd; as where the voter is contradicted by his own declaration at the poll, &c. The caſes of Hertfordſhire and Surry, in 1695 [h], in which it was decided, "that evidence ought not to be admitted to diſqualify an elector, as no freeholder, who at the election ſwore himſelf to be a freeholder, cannot be now cited as law; but they clearly afford the inference which Mr. Serjt. Heywood has drawn from them; namely, that a ſheriff, in thoſe days, would not have dared to exerciſe an authority, which the Houſe itſelf did not poſſeſs. They ſhew, that the Houſe of Commons conſidered the oath of the freeholder as concluſive. The ſtat. 7 & 8 W. 3. c. 25 [i]. impoſed an oath in more preciſe and particular terms, to be taken by the elector, at the requeſt of a candidate; by this oath, he muſt ſwear that he is a freeholder to the value of 40ſ. a year, and that he has not polled before at the election; and he muſt declare the place where his freehold lies. By ſt. 10 Ann. c. 23. ſ 4. upon the requiſition either of a candidate, or of an elector, the freeholder is obliged to take an oath ſomewhat different from the laſt, in the ſtead thereof; being directed to ſwear, in addition to what was required of him by the ſtatute of W. 3. that his eſtate was not granted to him fraudulently: and this oath having been alſo repealed by ſt. 18 G. 2. c. 18. ſ. 1., the freeholder's oath, which has continued in uſe to the preſent day, was ſubſtituted in its place [k]; an oath, conceived in terms ſtill more preciſe than any

Hertfordſhire and Surry, 1695.

St. 7 & 8 W. 3. c. 25.

St. 10 Ann. c. 23.

St. 18 G. 2. c. 18.

[h] 11 Jour. 393. and ſee the caſes collected 1 Heyw. 313, 314.

[i] S. 3. "You ſhall ſwear that you are a freeholder for the county of and have freehold lands or hereditaments of the yearly value of forty ſhillings, lying at , within the ſaid county of , and that you have not been before polled at this election."

[k] S. 1. "You ſhall ſwear, (or being one of the people called Quakers, you ſhall ſolemnly affirm) that you are a freeholder in the county of , and have a freehold eſtate, conſiſting of (ſpecifying the nature of ſuch freehold eſtate, whether meſſuage, land, rents, tythe, or what elſe; and if ſuch freehold eſtate conſiſts in meſſuages, lands, or tythes, then ſpecifying in whoſe occupation the ſame are; and if in rent, then ſpecifying the names of the owners or poſſeſſors of the lands or tenements, out of which ſuch rent is iſſuing, or of ſome or one of them) lying or being at in the county

any of the former, ſpecifying the nature of the freehold, and referring to the length of poſſeſſion in the voter: and by ſect. 5. of the ſame ſtatute, a penalty of 40*l.* is impoſed, to be recovered by any candidate for whom the vote ſhall not have been given, from any perſon who ſhall vote at an election, without having ſuch a freehold as is deſcribed by the terms of the oath. The fact of this oath having been made the ſubject of ſo many ſtatutory proviſions, ſtrongly ſhews, that it was intended by the legiſlature to ſerve as the only teſt of the qualification of the freeholder; and that it was not ſuppoſed that the ſheriff had a power of receiving evidence *aliunde*, or of examining the voter himſelf, beyond the terms of the oath; (except ſo far as the ſt. H. 6. gives him a power of inquiring into the value of the freehold;) and it is remarkable that neither theſe ſtatutes, nor any other, either expreſsly mention, or at all allude to, any power in the ſheriff to judge of the qualification of electors: their proviſions immediately affect the voters themſelves, and the penalty is inflicted, not on the officer who receives them, but on the voters who preſent themſelves under a falſe title, which that officer can neither detect, nor diſallow. It may alſo be obſerved, that the ſtatute 25 G. 3. c. 84. ſ. 1. limits the duration of the poll of all the electors, to 15 days; but allows the ſpace of 30 days to a ſcrutiny, which is but the inveſtigation of a certain number of diſputed votes. From this diſtinction, it ſhould ſeem that the examination of a diſputed title was no part of the duty of a returning officer at the poll; for otherwiſe, the time allowed him, appears, from the ſtatute itſelf, to be much too ſhort for that purpoſe.

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county of , of the clear yearly value of forty ſhillings over and above all rents and charges payable out of, or in reſpect of the ſame; and that you have been in the actual poſſeſſion or receipt of the rents and profits thereof, for your own uſe, above twelve calendar months, or that the ſame came to you within the time aforeſaid, by deſcent, marriage, marriage-ſettlement, deviſe, or promotion to a benefice in a church, or by promotion to an office: and that ſuch a freehold eſtate has not been granted or made to you fraudulently on purpoſe to qualify you to give your vote; and that the place of your abode is at in , and that you are twenty-one years of age, as you believe, and that you have not been polled before at this election."

The truth of the propoſition ſtated at the commencement of this argument, has now been demonſtrated. It has been ſhewn that the powers of the returning officer are limited, and that his means of inveſtigation are confined to the oath of the freeholder. It has alſo been ſhewn that he is a miniſterial officer; as ſuch, it is no part of his duty to inquire into fraudulent or colourable titles; as ſuch alſo, he is liable to an action for refuſing the vote of an elector; as it was determined in the caſe of Aſhby *v.* White: and the modern caſe of Sargent *v.* Milward[l] confirms the ſame doctrine. The law therefore requires of him no more than the upright and impartial execution of a miniſterial duty, ſince it has given him neither power nor protection in the exerciſe of judicial functions; and the conduct of a returning officer ſhould be examined with peculiar lenity, inaſmuch as this burden is caſt upon him by compulſion, without the liberty to reject it, and without any reward for the execution of it[m].

An action lies againſt him as a miniſter.

Mr. Adam then diſcuſſed the facts that had been proved againſt his clients on the part of the petitioner, and opened the evidence which he propoſed to offer in their defence: he contended, as the reſult of the whole, 1. that they had not acted illegally; 2. that they had not acted corruptly; with what ſucceſs, the reader is again referred to the report of the committee to aſcertain. Upon the concluſion of his

[l] Mentioned, 2 Lud. 248. The action was brought in the Common Pleas againſt the mayor of Haſtings for *maliciouſly* refuſing the plaintiff's vote; and he obtained a verdict for 2*col.* damages. A writ of error being brought in the King's Bench, the judges ſtopped the argument, by declaring that the point had been already ſettled in the caſe of Aſhby *v.* White, in the Houſe of Lords. In the caſe of Drewe *v.* Coulton, Launceſton Spring Aſſizes, 1787, Wilſon, J. held the action to lie only in caſes where malice could be proved. See 1 Eaſt Rep. 563. *in not.* and 2 Lud. 245. S. C. It is to be obſerved that neither of theſe caſes was taken notice of by the Houſe of Commons: but ſo late as the year 1767, 9th March, a complaint was made of actions having been brought againſt the ſheriff of Pembrokeſhire, for refuſing the votes of certain perſons: on the 6th April the Houſe were informed that the actions were about to be diſcontinued: and upon being informed (on the 9th April) that they had actually been diſcontinued, it was reſolved that the Houſe would not proceed to hear the matter of the complaint. See the Journals of theſe dates.

[m] See 1 Eaſt. Rep. 565. and ſee the caſe of Metcalf *v.* Hodgſon, Hutton's Reports, 120.

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addreſs, he propoſed to call his witneſſes; but the counſel for the petitioner inſiſted that the ſitting member's caſe ſhould firſt be opened; the counſel for the latter, as well as Mr. Adam, objected to this propoſal; but the committee determined [n] "that the ſitting member ſhould now proceed to open his caſe." Mr. Plumer accordingly [o] addreſſed the committee on the part of Sir F. Burdett; after which the witneſſes for the ſheriffs were called and examined [p]. Their evidence related to the conſtruction of the huſtings, the order obſerved in the conduct of the poll, and the manner in which the caſe of the mill-voters was argued; it was deſigned by this latter evidence, to ſhew that they were juſtified upon the ſtatement of the facts as repreſented to them, and upon the arguments by which they were ſupported, in receiving them. It may be proper in this place, to give a ſhort account of the circumſtances of theſe perſons, and of the property in reſpect of which they were permitted to vote, as they appeared from the evidence produced on the part of the petitioner, and of the ſheriffs.

The fitting member to open his caſe, before witneſſes are called on behalf of the ſheriff.

Subſtance of the ſheriff's defence.

In the month of May, and in the beginning of June, 1801, certain perſons living at Iſleworth, formed themſelves into a ſociety called 'The Good Intent Society;' the purpoſe of which was to grind corn at a cheap rate for their own uſe: their number was not above four, or five, till 11th June, when a meeting of them and of their friends was held, and the 27th July was fixed to be the day when their ſubſcriptions ſhould commence. Theſe ſubſcriptions, however, were not regularly begun to be made, or entered in their books till the 4th Aug.; at which time the ſociety conſiſted of between 80 and 90 perſons, who held among them 120 or 130 ſhares; the plan was, to have 1002 ſhares, when the ſociety ſhould be complete.

Hiſtory of the mill-voters.

On the 24th Aug. 1801, a memorandum of an agreement was drawn up between Richard Friday, and "the Inſpectors of the Good-Intent Society on the behalf of the ſaid ſociety," by which Friday agreed to ſell a certain piece of freehold land in Iſleworth, with three houſes ſtanding there-

[n] 20th Feb.
[o] 22d Feb.
[p] 23d and 24th Feb.

on, to the ſaid ſociety, who, on their part, agreed to give him 360*l.* for the ſame. This agreement was ſigned by Friday; and by 11 inſpectors, of whom Albion Cooper was one.

On the 13th Oct. in the ſame year, a ſecond agreement was made, between Friday, and 15 perſons by name, on behalf of the ſociety, 11 of whom had been parties to the former agreement, whereby it was recited, that by certain rules and articles, bearing date 27th July, 1801, made and entered into between the ſaid perſons and many others, a ſociety had been agreed to be formed called the Good-Intent, for the purpoſe of ſupplying the ſubſcribers with bread and flour at their own houſes, at prime coſt; that it was neceſſary for that purpoſe to erect a mill; and that the purchaſe of the above-mentioned piece of land, &c. from Friday, had already been contracted for: and it was agreed, that Friday, in conſideration of 360*l.* paid or ſecured to him, ſhould ſell and convey the premiſes to the ſaid 15 perſons, and ſhould clear away the ballaſt, ſo that a barge might moor cloſe to the ſaid ground. There appeared to be ſome doubt as to the time when the poſſeſſion of this land was actually delivered up by Friday to the ſociety, but this rather ſeemed to have taken place immediately after the agreement in Auguſt; however, it appeared from the teſtimony of all the witneſſes, that the poſſeſſion was delivered up as from the Midſummer preceding [q]. The piece of ground thus contracted for was about 90 feet long, and 45 feet wide: the three cottages which then ſtood upon it, were in the occupation of yearly tenants, at the rent of ſix guineas each: by the advice of Friday, the rent from Midſummer was given up by the ſociety to the tenants, in conſideration of their quitting at Michaelmas. Upon the premiſes becoming vacant the ſociety cauſed two of the cottages to be pulled down, and began to erect a mill, which, however, at the time of the election, was far from being

[q] It was repreſented at the huſtings, and ſeems to have been there admitted as a ground of argument on all ſides, that the poſſeſſion was given up 27th July 1801: at which time the ſubſcriptions were made to commence.

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finiſhed, being not yet covered in; ſo that no profit whatever had at that time accrued to the ſociety, either from the mill, or from the land.

Friday himſelf was the treaſurer of the ſociety, from 20th Aug. 1801. On 28th Sept. he received 100*l.* in part payment of the conſideration for the ſale; he received 50*l.* more a ſhort time before the election; and ſoon after the election was finiſhed, he received the remainder of the 360*l.* The conveyance was made ſome time in the year 1803. Friday, in his evidence before the committee, ſpoke at firſt of an agreement ſo early as June 1801, and that it had been reduced into writing; but upon further recollection he would not undertake to ſpeak poſitively to the date of it, even within two, or three months; and no agreement prior to the 24th Aug. was produced, or proved.

On the 13th July 1802 (the firſt day of the election) the number of ſubſcribers was between 200 and 300: from the 27th to the 30th no fewer than 200 perſons, being for the moſt part labourers and mechanics, entered their names as ſubſcribers. A new member paid 2*s.* 6*d.* upon his admiſſion, and 1*s.* *per* week afterwards, for 42 weeks. Some of the perſons admitted on the 27th and two following days, paid their entrance money, and at the ſame time advanced their payment for the 42 weeks, at once: others paid for their admiſſion, and 1*s.* only, for the current week. 7 or 8 of the ſubſcribers voted for the ſitting member on the 27th, and a very large number on the 28th, many of whom had been admitted only the day before: on the 29th, not above 13: but ſeveral more preſented themſelves to vote on that day, and being told they had no vote, retired.

Albion Cooper, on the 13th day of the poll, 27th July 1802, was the firſt perſon who tendered his vote for the ſitting member, for his property as a member of the ſociety which has been deſcribed. He was objected to by the inſpector who attended on the part of the petitioner, and was carried round to the ſheriff's box. Here a witneſs, in the preſence of the ſheriffs and of the voter, gave an account of the conſtitution of the ſociety, the number, and nature of the ſhares, the preſent ſtate of the mill, and, that poſſeſſion. Albion Cooper.

poſſeſſion of the land had been delivered on the 27th July, 1801. Cooper, on his examination before the ſheriffs, ſtated that he was poſſeſſed of two ſhares in the concern; that he had been in poſſeſſion of them for more than twelve months, having been one of the original projectors of the plan, and the poſſeſſion of the premiſes having been given to the ſociety as from Midſummer 1801; and that although he had received no profits from them as yet, he would not part with either of them for 40*s. per annum.* Upon being examined as to the nature of thoſe profits, he ſtated that he expected to have, for each ſhare, four quartern loaves *per* week, at two-thirds of the market price: the price of a quartern loaf at that time, was nine-pence. The counſel for Mr. Mainwaring argued againſt his right to vote, firſt, upon the ground of a want of poſſeſſion for 12 months: ſecondly, of a want of ſufficient value: thirdly, that the voter was not aſſeſſed. And their arguments were controverted on the other ſide. Sir W. Rawlins on being requeſted by Mr. Mainwaring's counſel to reject Cooper's vote, after conſulting with his under-ſheriff, refuſed ſo to do; alleging, that although his opinion was, that Cooper had no right to vote, the ſheriff was only miniſterial, and could not refuſe either to receive the vote, or to adminiſter the oath, if the voter was willing to take the oath, and inſiſted upon voting: that nevertheleſs, he would admoniſh the voter of his duty; which he accordingly did. Cooper retired for half an hour, and then returned and took the oath, and his vote was admitted. The arguments upon his right laſted for three or four hours. Another perſon, who was ſaid to have been admitted the night before, coming to vote the next day for a ſimilar ſhare, was objected to for want of poſſeſſion, and as coming within the ſtatute of W. 3. againſt ſplitting tenements; but the ſheriffs refuſed to hear any more arguments; alleging, that the whole ſubject had already been thoroughly diſcuſſed; and from that time no queſtions were permitted to be aſked the voters, concerning the length of their poſſeſſion, till on the laſt day of the election: when the queſtion was put to ſeveral, whether they had been in poſſeſſion 12 months; upon their anſwering that they had not, one of the ſheriffs

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(Sir W. Rawlins) informed them they could not vote, and in conſequence, they did not vote.

As the reader may be curious to be informed by what arguments Cooper's title was ſupported before the ſheriff, the following ſhort heads of them are extracted from the evidence given before the committee. It was ſaid, that joint-tenants were ſeiſed *per my, & per tout*: the poſſeſſion of one, was the poſſeſſion of all, and of the whole land: that an agreement for a ſale carried an equitable freehold, although the conveyance was not actually made, nor the whole of the purchaſe-money paid: that the ſtatute requiring a poſſeſſion of 12 months, was ſatisfied, by the property having veſted in the elector for that time; and that it was not neceſſary that he ſhould be in the occupation of it. That although the ſtatute required a poſſeſſion of 12 months, it did not require that the freehold ſhould have been for ſo long of the value of 40*s. per ann.*; it was ſufficient, if it was ſo at the time of voting: that it is required of the voter to have been in actual poſſeſſion of the land, *or* to have received the rents and profits thereof, for above 12 months; therefore, an actual poſſeſſion was ſufficient, without the perception of any rents or profits at all. That ſo long as the land was of the annual value of 40*s.* it was not neceſſary that it ſhould actually have produced a profit of 40*s.* during the year before the election: and inſtances were put of an eſtate recently waſted by rebels, or left untilled for the purpoſe of defrauding a parſon of his tithes; and, of a growing wood. That if theſe ſhares did not give a title to vote, no property, the profits of which depended upon ſpeculation, could give a title. As to the aſſeſſment, that it had been aſſeſſed in the ſpring, 1801, in the name of the owner at that time; and no new rate having been made, till within ſix months of the election, it was impoſſible that the names of the preſent owners could appear; and that it could not be ſuppoſed that the act intended to deprive perſons, in ſuch circumſtances, of their franchiſe.

Argument in ſupport of the right of Albion Cooper.

St. 18 G. 2. c. 18. ſ. 5.

The report of the committee (made 3d July) upon this part of the caſe, was as follows:

'Reſolved,

Special report.

'Reſolved, that it appears to this committee, that on the 13th, 14th, and 15th days of the poll, on the firſt of which days there was a conſiderable majority of votes in favour of W. Mainwaring, Eſq., the ſheriff, Robert Albion Cox, Eſq. and Sir William Rawlins, Knt. wilfully, knowingly, and corruptly did admit to poll for Sir F. Burdett, Bart. upwards of 300 perſons, claiming to vote under a fictitious right, as proprietors of a mill purported to be ſituate in the pariſh of Iſleworth, and called the Good-intent-mill, by which means a colourable majority was obtained in favour of Sir F. B., who was thereby returned as having the greateſt number of votes.

'Reſolved, that it appears to this committee, that on the 15th day, towards the cloſe of the poll, after ſuch majority was eſtabliſhed, they rejected perſons tendering their votes under the ſame circumſtances.

'Reſolved, that it appears to this committee, that the ſheriff, at the poll, acted in a judicial capacity, by admitting counſel to argue the validity of votes, and by deciding, in ſome inſtances, on the validity of ſuch votes: that, in other inſtances, they refuſed to decide on the validity of votes which were objected to; and ſtated, that they would admit any perſons to poll, who would take the oaths, declaring themſelves to be only miniſterial officers, thereby acting in a manner contradictory to their practice in other caſes, and in flagrant violation of their duty.

'Reſolved, that it appears to this committee, that the obvious tendency of their conduct was to admit perſons having no right to poll, and to afford the greateſt encouragement to perjury.'

It was ordered that the report, and alſo, that ſo much of the minutes of the committee as related thereto, ſhould be printed.

Proceedings in the Houſe thereupon.

After ſeveral debates, and after hearing the counſel for the ſheriff at the bar of the Houſe, of which proceedings the reader will find the entries in the Journals of 21ſt Jan. 1805, 25th Jan., 29th Jan., 1ſt Feb., 5th Feb., 8th Feb., 13th Feb., 19th Feb., 27th Feb., 1ſt Mar., and 8th Mar.;

On

On the 11th Mar. the Houſe agreed with the committee in their reſolutions, and alſo reſolved, 'that the ſaid R. A. C., Eſq. and Sir W. R., Knt. by their conduct and practices at the ſaid election, as ſtated in the foregoing reſolutions, as well as by refuſing to refer to the aſſeſſments for the land-tax[r], acted in violation of their duty, contrary to law, and in breach of the privilege of this Houſe.' And it was ordered, that they ſhould be committed to Newgate. On the 10th May they were diſcharged, after receiving the following reprimand from the Speaker:

Sir William Rawlins, and Robert Albion Cox,

Sheriffs reprimanded.

'Your conduct having undergone the ſevere but juſt animadverſion of this Houſe, followed by a ſentence of ignominious impriſonment, it is fit to be underſtood by you, and by all men, what this Houſe has conſidered to be the character of your offence, and upon what grounds you are this day to be liberated.

'The ſum of your offence is this: that you, being the ſheriff and returning officer, did, at an election for the county of Middleſex, for the purpoſe of giving a colourable majority to one candidate in prejudice of another, wilfully, knowingly, and corruptly admit fictitious votes upon the poll; that your inconſiſtent and contradictory practices afforded the greateſt encouragement to perjury: and that you refuſed to examine the validity of votes by reference to the land-tax aſſeſſments, in defiance of the laws of your country.

'Greater offences than theſe cannot be laid to the charge of any men holding the high office with which you were then inveſted: an office to which you were raiſed by the free choice of your fellow-citizens in the metropolis of this empire, and of which office you betrayed the moſt important duties; violating at once the freedom of elections, the privileges of this Houſe, and the juſt conſtitution of parliaments.

'Upon theſe charges, eſtabliſhed by ample and concluſive evidence, you were committed to his Majeſty's gaol of New-

[r] This relates to another charge of miſconduct againſt the ſheriffs, diſcloſed in the courſe of the evidence, which produced no ſubject of argument worthy to be reported.

gate,

gate, the common receptacle of malefactors; there to remain priſoners, amongſt thoſe over whom you had been magiſtrates: a ſignal proof of the power and the juſtice of this Houſe, an indelible diſgrace upon you, and a memorable example to others.

'Nevertheleſs, it appearing now, by your petition, that your minds have been humbled to a due ſenſe of your miſconduct, and that your errors may be in ſome degree imputed to the ignorant or criminal advice under which you unfortunately acted, this Houſe is willing to believe that the ends of juſtice are at length ſatisfied: it has therefore conſented that you be now diſcharged.

'And you are diſcharged accordingly; paying your fees.'

Vote of Albion Cooper declared bad,

The vote of Albion Cooper, the firſt of the mill-voters, was called on, in its order, in the pariſh of Iſleworth, 24th March. The committee determined, "that the counſel for the ſitting member be directed to call evidence in ſupport of the vote of Albion Cooper, on the ground of aſſeſſment, in the firſt place." Upon this, an aſſeſſment was put in, of the year 1801, upon Richard Friday, as owner and occupier of certain land in Iſleworth of the value of 80*l.* a-year; but after hearing evidence for ſome time, adduced for the purpoſe of ſhewing that ſome part of this land was the ſame as that for which the vote was given, the committee determined that it was not proved that Richard Friday was aſſeſſed in 1801, for the eſtate afterwards ſold to the voters for the Good-intent-mill: and that Albion Cooper was a bad vote[s]. Further evidence to the ſame purpoſe was given, on the vote of Thomas Durrant, the ſecond mill voter: and the committee came to the ſame reſolution[t]: and the votes of the reſt were ſtruck off upon the ſame ground.

and of the other mill voters.

Scrutiny of the votes given for petitioner.

On the 9th April, the evidence in ſupport of the votes objected to by Mr. Mainwaring being finiſhed, the committee proceeded to try the objections made by Sir F. Burdett

[s] The reader will ſee hereafter (William Stunnell's vote) that if it had appeared that the land had been aſſeſſed in the name of the perſon actually occupying the premiſes at the time of making the rate, the objection of non-aſſeſſment would have been removed, on proving the voter's title.

[t] 26 and 27 Mar.

againſt

againſt 2367 of the votes given for Mr. M. This laſted till the 4th July, when it appeared that the petitioner had a majority upon the poll, exceeding the number of votes objected to by the ſitting member, and remaining to be tried. The committee then determined to ſuſpend the ſcrutiny; to hear the counſel for the petitioner on the remaining part of his caſe; and then, to hear the queſtion argued, reſpecting the right of the petitioning electors, to appear before them, as petitioners. But Mr. Serjt. Lens, on the part of the petitioners informed the committee, that it was not the intention of Mr. Mainwaring, or of the petitioning freeholders, to offer any further evidence. Mr. Adam, on the part of the ſheriffs, then addreſſed the committee: he obſerved, that although the caſe on the part of the petitioners was cloſed, a part of the ſitting member's caſe ſtill remained to be gone into, and requeſted to be informed when it would be their pleaſure that he ſhould ſum up the caſe of his clients. The chairman ſignified to him that he would be heard, as ſoon as the caſe of the ſitting member was finiſhed.

End of the ſcrutiny.

End of the petitioner's caſe.

On the next day, the counſel for the ſitting member opened their charges againſt Mr. Mainwaring for bribery, and treating. They offered evidence only as to the latter; and they proved the diſtribution of a conſiderable quantity of victuals, to voters in Mr. Mainwaring's intereſt, provided for them at the Caſtle Inn at Brentford, by the order of perſons proved to be the agents of Mr. Mainwaring; and for which other perſons, alſo proved to be agents for Mr. M., had promiſed to pay. This charge was ſo clearly made out, that the counſel for the petitioner declined to addreſs the committee in his defence; and it is therefore unneceſſary to preſent to the reader a more minute detail of the evidence. It is ſufficient to ſtate; 1. that the entertainment afforded to the voters was not proved to be by any means extravagant, nor was it at all charged, or inſinuated, that it was given them for the purpoſe of influencing their votes, or for any other purpoſe, than merely for their neceſſary refreſhment. 2. That in the proof of this offence as againſt Mr. M, the agency of Mr. Hindley was conſidered by the committee to be ſufficiently proved, by ſhewing that he was

5th July.

Charges of bribery and treating againſt petitioner.

Proof of agency.

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the avowed agent during the courſe of the election for all lawful purpoſes[v]. 3. That Mr. Hindley having as agent to Mr. Mainwaring, ordered that the directions of Mr. Newcomb ſhould be followed, (with reſpect to treating the voters) the directions which Mr. Newcomb gave in conſequence of this order, were held by the committee to be admiſſible in evidence againſt Mr. Mainwaring. Upon Mr. Piggott declining to reply on the part of his client, Mr. Adam alſo forbore to obſerve further upon the caſe of the ſheriffs.

Acts of a ſub-agent, evidence.

Report.

On Monday, 9th July, the committee, having ſat 120 days, reported that Sir F. Burdett was not duly elected: that W. Mainwaring, Eſq. was duly elected, and ought to have been returned: that at the laſt election W. M., Eſq. did by his agents, commit acts of treating, whereby he was incapacitated to ſerve in parliament upon ſuch election: that the laſt election was void, ſo far as it reſpected the return of the ſaid Sir F. B.: together with the uſual reſolutions that neither the petitions, nor the oppoſition to them, were frivolous, or vexatious.

Incidental points.

The returning officer, in his defence, is not permitted to give evidence of treating againſt the petitioner.

Mr. Adam, as counſel for the ſheriffs, in his croſs-examination of the firſt witneſs for the petitioner, put ſome queſtions to him concerning certain houſes ſuppoſed to be opened for the voters, by Mr. Mainwaring, or his agents: it was objected, that this could form no part of the defence of the ſheriffs; but rather belonged to the caſe of the ſitting member. The committee admitted the objection; and the witneſſes were in the ſequel croſs-examined both on the part of the ſheriffs and of the ſitting member.

Agency muſt be proved, before criminal acts.

A witneſs, having proved upon his croſs-examination that the Caſtle at Brentford had been open during the election for the reception of Mr. Mainwaring's friends, and that one C. had paid, in the preſence of the witneſs, for the proviſions furniſhed to them; was then aſked, what ſum had been ſo paid? This queſtion was objected to, as tending to introduce the acts of a third perſon, before his employment, or agency, had been proved. In anſwer to the objection,

[v] See *ante*, vol. i. p. 467.

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an obſervation made by a member of the committee in the late caſe of Midhurſt [u] was ſtated, namely, that where the agency, and the offence to be proved, were in their nature mixed, not to allow the evidence of the facts themſelves in the firſt inſtance, was in reality to exclude that which tended to prove both the agency, and the offence itſelf, at the ſame time.

The committee determined, "that proof of agency muſt be brought forward, before any evidence of criminal acts is given; and therefore, that the queſtion be not put [w]."

What has been ſaid by the under-ſheriff at the poll, cannot be proved, to affect the ſheriff criminally, unleſs an expreſs authority be ſhewn.

Mr. Sylveſter, the recorder of London, who had been counſel for Mr. Mainwaring during the election, and was called as a witneſs on his part, was proceeding to relate a converſation between himſelf and Mr. Welch the under-ſheriff, upon the ſubject of the mill-voters. The converſation took place at the huſtings, while theſe men were tendering their votes, and taking the freeholder's oath: but the ſheriffs were not preſent, nor had any proof been given of the agency of Mr. W. It was objected, that the ſheriffs being criminally implicated, ſuch evidence could not be received againſt them; that in general, a converſation between third perſons was inadmiſſible, except where it had been held in the preſence of the party accuſed; in which caſe, the demeanor of the party during ſuch a converſation, might with propriety become the ſubject of evidence againſt him: another exception was, where the perſon whoſe declarations were offered in evidence, had been firſt proved to be an agent: which had not been done in this caſe; for it by no means followed, that becauſe Mr. W. was the under-ſheriff, every word which he had ſaid was ſpoken by the particular authority and command of his ſuperior.

On the other hand it was ſaid, that the queſtion being upon the admiſſibility, not upon the effect of the evidence, the conſideration, how far it might criminate the ſheriffs, was not now to be entered into. As to the admiſſibility of it, the returning officer was bound to be preſent at the election, either perſonally, or by his deputies, for whom he was re-

[u] The next caſe. [w] See vol. I. p. 7. 209. 304. 467. 479.

ſponſible. He could not therefore get rid of his reſponſibility, by ſending his deputies to act for him; otherwiſe, in a county election, where there were many places for polling, he might commit the greateſt partiality with impunity, by contriving ſo, that the moſt flagrant inſtances of it ſhould take place at thoſe booths, where he was not preſent. It was alſo ſubmitted, that if this evidence ſhould not be held ſufficient to charge the ſheriffs criminally, ſtill it was admiſſible as part of the *res geſta*, ſo far as related to the illegal admiſſion of the mill voters, and to the right of the petitioner to have the return in the firſt inſtance declared in his favour.

In reply, it was admitted that what was done by the under-ſheriff, under the conſtituted authority of the ſheriff, in his abſence, ſuch as the admiſſion or rejection of votes, was evidence; but it was again inſiſted, that he could not be preſumed, without proof, to have made uſe of any particular expreſſions, by the command of his principal, who was to be criminally charged therewith.

The committee rejected the evidence [x].

A witneſs protected from criminating himſelf: but

Albion Cooper took the freeholder's oath, and voted, at the election, for the ſitting member, in right of one of the ſhares of the Good-Intent mill. He was called as a witneſs

[x] See vol. i. p. 375.

It may be uſeful in this place to bring to the notice of the reader what was ſaid by the Maſter of the Rolls (Sir W. Grant) in the caſe of Fairlie v. Haſtings, 10 Veſey jun. Rep. 126. "An agent may undoubtedly, within the ſcope of his authority, bind his principal, by his agreement; and in many caſes by his acts. What the agent has ſaid may be what conſtitutes the agreement of the principal: or the repreſentations or ſtatements made may be the foundation of, or the inducement to, the agreement. Therefore if writing is not neceſſary by law, evidence muſt be admitted to prove the agent did make that ſtatement or repreſentation. So, with regard to acts done, the words with which thoſe acts are accompanied, frequently tend to determine their quality. The party therefore, to be bound by the act, muſt be affected by the words. But except in one or the other of thoſe ways, I do not know, how what is ſaid by an agent can be evidence againſt his principal.——The admiſſion of an agent cannot be aſſimilated to the admiſſion of the principal. A party is bound by his own admiſſion; and is not permitted to contradict it. But it is impoſſible to ſay, a man is precluded from queſtioning or contradicting any thing any perſon has aſſerted as to him, as to his conduct or agreement, merely becauſe that perſon has been an agent of his. If any fact, material to the intereſt of either party, reſts in the knowledge of an agent, it is to be proved by his teſtimony, not by his mere aſſertion."

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on the part of the petitioner, to prove what paſſed at the huſtings when he gave his vote, and by whoſe perſuaſion it was, that he was induced to take the oath. The witneſs himſelf objected to his being examined, and the counſel for the ſitting member requeſted the chairman to inform him, that he was not obliged to give an anſwer to any queſtions which might hereafter be oppoſed to his oath, or which might tend to criminate himſelf: and the caſe of Southwark [7] was cited, in which the publicans who were called to prove the charge of treating againſt Mr. Thelluſſon, were cautioned by the chairman not to anſwer any queſtion which might tend, in their own opinions, to criminate themſelves. It was obſerved by one of the committee, that it might ſtill be ſafe for the voter to anſwer many things which might be oppoſed to what he had ſworn, ſince the charge of perjury conſiſted in *wilfully* ſwearing what was falſe. To this it was anſwered, that the examination could hardly be entered into, without drawing from the mouth of the voter himſelf the fact of his having taken the oath: at his trial for perjury, he might defend himſelf either by proving the innocence of his intention, or the truth of what he had ſworn; or he might deny that he had ſworn at all, and put it upon his proſecutor to prove it; but the laſt ground of defence would be taken away from him, if he were now obliged to declare the fact, upon his oath. The ſecond objection made againſt his teſtimony was, that the examination tended to invalidate his own title to vote. The counſel on the other ſide diſavowed any intention to criminate the witneſs, or to deſtroy his vote, by his own teſtimony: they ſaid, that the purpoſe of calling him was to ſhew the criminal conſpiracy of other perſons to carry the election by fabricated votes; to ſhew who thoſe perſons were, and to what means they had reſorted. And they ſaid, that the books belonging to the ſociety of the Good-Intent mill being in the cuſtody of the witneſs, who was one of the truſtees, they had alſo a right to call upon him to produce them, for the purpoſe of affecting the votes of the reſt of the mill voters. The committee

allowed to be examined (for the purpoſe of criminating the ſheriffs) as to matters which had an indirect tendency to invalidate his own vote.

[7] Clifford, 103, 104. But ſee Mr. Clifford's obſervations upon that determination. *Ibid.*

admitted the witneſs, and directed the examination to proceed, the witneſs having been admoniſhed "that if any queſtion ſhould be aſked him which he thought would criminate himſelf, he might claim the protection of the committee not to anſwer that queſtion."

Scrutiny of votes.

It has been thought adviſeable to ſeparate the ſcrutiny of votes, from the general account of the courſe of the trial, in order more conveniently to arrange the caſes that occurred in the former. Theſe caſes will be diſpoſed according to the following analyſis [z]:

Analyſis.

I. Mode of proceeding adopted by the committee, in the ſcrutiny.

II. Liſts of objections delivered by the parties to each other, by order of the Houſe of Commons.

Proceedings of the committee with reſpect to them.

III. Queſtions ariſing from the deſcription of the voter on the poll.

1. General reſolutions of the committee with reſpect to the entries on the poll.

2. Inſufficient deſcription of the voter's reſidence.
of the ſituation of his freehold.
the nature of it.
the occupier of it.

3. Untrue deſcription of himſelf.
his reſidence.
the ſituation of his freehold.
the nature of it.
the occupier of it.

IV. Queſtions ariſing from the ſtatutes requiring the aſſeſſment of the voter's freehold to the land-tax.

1. Not aſſeſſed as deſcribed on the poll.
In the name of the owner or tenant.

[z] The reporter has ſubjoined ſuch of the deciſions of the Houſe in the caſes of Yorkſhire 1735, and Oxfordſhire 1755, and of the ſelect committees in the caſes of Glouceſterſhire 1777, and of Cricklade, Bedfordſhire, and Buckinghamſhire 1785, as appeared to apply to the ſubjects of the deciſions here reported.

in

in reſpect of the ſituation of the freehold.
of the nature of it.

2. Not duly aſſeſſed;
In the name of the owner or tenant.
From ſome irregularity in the form, &c. of the aſſeſſment.
In reſpect of the nature of the freehold.
In reſpect of the time of the aſſeſſment.

3. Of exemptions from aſſeſſment; in the caſe of
Rent-charges,
Fee-farm-rents,
Land-tax redeemed,
Offices,
Succeſſion by marriage, deſcent, deviſe, or preferment.

4. Evidence of aſſeſſment.

V. Queſtions relating to the eſtate of the voter; ariſing,
1. From the nature of it,
2. the value of it,
3. the local ſituation of it,
4. the title of the voter to it.
5. his intereſt in it.
6. the time of his poſſeſſion of it.

VI. Queſtions relating to the perſon of the voter;
1. In reſpect of office.
2. the receipt of alms.
3. being an alien.

VII. Queſtions relating to evidence.
1. Who is permitted to be a witneſs, or to produce written evidence.
2. Who is compellable to be a witneſs, or to produce written evidence.
3. Who is diſabled in point of intereſt from being a witneſs.
4. Of witneſſes who have been in the committee-room during the trial.
5. Of the reproof or puniſhment of witneſſes, for improper conduct.

6. Of written evidence.
7. Of parole evidence to explain written evidence.
8. Of hearſay evidence.
9. Of the confeſſion or declarations of the voter.
10. Evidence of particular facts.

I. Mode of proceeding adopted by the committee in the ſcrutiny.

Evidence for the petitioner on the head of aſſeſſment.

It has already been ſtated [a], that on the 16th Feb. a liſt was given in, on the part of the petitioner, of perſons who had voted for the ſitting member, and who upon examination, were found not to be rated to the land-tax, according to the deſcription they had given of themſelves at the poll.

Opening of the ſitting member's caſe.

On 22d Feb. Mr. Plumer opened the caſe of the ſitting member, by generally ſtating the grounds of objection upon which he meant to diſqualify the petitioner's votes.

Evidence for ſitting member to juſtify his own votes.

On the 25th the counſel for the ſitting member entered upon their evidence; and began, by defending their own votes, which had been affected by the evidence of the petitioner. 25th Feb. The entry on the minutes is as follows: "The counſel on the behalf of the ſitting member ſtated that they ſhould now proceed to the defence of the votes which are objected to by the petitioner upon the ground of not being duly aſſeſſed.

The committee reſolve to decide on the votes ſeparately.

"The counſel, having by agreement defired the committee to decide on the validity of each vote objected to on the head of not being aſſeſſed, as it ariſes, and alſo that the counſel for the objection ſhould begin, and reply: and that only one counſel on each ſide ſhould be heard;

"The committee determine, that they will adopt the mode of proceeding recommended by counſel, unleſs in any particular inſtance the committee ſhould ſee ſpecial reaſon to depart from the rule."

[a] *Ante*, p. 11. What is there ſtated, *viz.* that this was all the evidence produced by the petitioner upon the ſubject of the majority of votes, will be referred to evidence impeaching the ſitting member's votes, and not to evidence in ſupport of his own votes, of which he produced a great deal in the ſubſequent ſtage of the trial.

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The votes were arranged by the different hundreds, and again, by the pariſhes in which the freeholds were ſituate, and by diviſions of pariſhes, where ſuch exiſted; they were called on alphabetically in each diviſion, and decided upon ſeparately [b]. It was agreed by the counſel on each ſide, and reſolved by the committee, that when one pariſh had been gone through, it ſhould not be returned to on any account, except where the conſideration of particular votes ſhould be expreſsly deferred, on account of witneſſes not attending, or for ſome other ſpecial reaſon. It may be proper here to mention the caſe of John Jolly, April 25, whoſe vote being called on in one pariſh, it appeared by the evidence that his freehold was in another; notice of this had been given by the party who was to ſupport the vote (the petitioner), when the votes in the pariſh in which the freehold was actually ſituated, were under diſcuſſion; and his counſel now objected to the examination of the vote. From his deſcription of the ſituation of his freehold upon the poll, (being a ſtreet) it did not appear in what pariſh it was ſituate. The committee determined to proceed upon the vote, but they reſolved, for the future, "that if the counſel for the petitioner give notice to the counſel for the ſitting member, in a caſe where it is doubtful where the freehold is ſituate, the counſel for the ſitting member ſhall proceed on the vote, in the pariſh, where it is ſtated by ſuch notice to be actually ſituated; but if the counſel for the petitioner have required a vote to be examined in one pariſh, he ſhall not be at liberty afterwards to defend it in any other."

A pariſh once gone through not to be returned to.

Vote called on in the wrong pariſh.

On the 9th of April the committee proceeded to try the objections made by Sir Francis Burdett, againſt the votes of Mr. Mainwaring, and they determined, "that they would decide on the validity of each vote ſeparately, unleſs they

Scrutiny of the votes for ſitting member.

[b] This was the mode of arrangement purſued by Mr. Mainwaring in his liſt of objections, and adopted by the committee, with the conſent of the ſitting member. It was not attempted on either ſide to add any rejected voter to the poll. The Bedfordſhire committee held, that it was not neceſſary to inſert the names of perſons ſo intended to be added, in the liſts of objections. See 2 Lud. 392.

ſhould ſee any reaſon to depart from that rule." [c] Liſts were put in on the part of the ſitting member, of the names of the perſons who, by a compariſon of the entries on the poll with the books of aſſeſſment, did not appear to have been duly aſſeſſed *. It was conſidered, that the evidence on this head was then cloſed: for when afterwards (April 28) the counſel for the ſitting member propoſed to call an aſſeſſor to ſhew that a voter (John Dixon) was not duly aſſeſſed, the committee determined, "that the counſel for the ſitting member ſhould bring no further evidence with regard to aſſeſſment." The trial of Mr. Mainwaring's votes continued till Wedneſday the 4th of July, when it appeared, that Mr. Mainwaring had a majority of 110 votes upon the poll, and that only 57 of thoſe votes had been objected to. The committee hereupon came to a determination that they would ſuſpend the ſcrutiny, as has been already mentioned, *ante*, p. 31. It may eaſily be ſuppoſed that the number of votes decided upon in each day differed extremely, according to the nature of the queſtions that aroſe, both of fact and law; in order to quicken their proceedings, the committee, having been frequently obliged to adjourn before the uſual hour on account of one of the parties not being prepared to proceed to the ſcrutiny of other votes, determined, 26th May, "that they expected the parties ſhould be prepared to proceed each day with one hundred votes at leaſt, and that they would not liſten to any excuſe for ſtopping ſhort of that number; that ſuch votes as the committee might permit to ſtand over ſhould be included in that number of one hundred."

* See *ante*, p. 11.

New evidence not allowed to prove non-aſſeſſment.

Cloſe of the ſcrutiny.

Reſolution to go thro' 100 votes each day.

II. Liſts of objections delivered by the parties to each other, by order of the Houſe of Commons.

Annual reſolution of Houſe of Commons.

The following reſolution is paſſed by the Houſe of Commons at the commencement of every ſeſſion: "that in all

[c] The Glouceſterſhire committee heard the whole of the evidence on the part of the petitioner, againſt all the votes objected to, before any evidence was received on the other ſide to ſubſtantiate them. See the caſe, p. 87. And it appears that the ſame courſe was adopted by the Buckinghamſhire committee, 1785. See 2 Lud. 600. In the Bedfordſhire caſe, the evidence to impeach the votes in a particular hundred was firſt heard, and then the evidence to ſupport them; after which the votes given for the oppoſite party were gone through in the ſame manner. See 2 Lud. 388. 393.

caſes,

caſes of controverted elections for counties in England and Wales [d], the petitioners do, by themſelves or by their agents, within a convenient time, to be appointed by the Houſe, deliver to the ſitting members, or their agents, liſts of the perſons intended by the petitioners to be objected to, who voted for the ſitting members: giving in the ſaid liſts, the ſeveral heads of objection, and diſtinguiſhing the ſame againſt the names of the voters excepted to; and that the ſitting members do, by themſelves or by their agents, within the ſame time, deliver the like liſts on their part to the petitioners, or their agents."

Orders of the Houſe of Commons in this caſe.

In purſuance of this reſolution, an order was made, 14th April 1803, that before 1ſt May, ſimilar liſts ſhould be delivered by each party in the preſent caſe: this order was diſcharged 26th April, and on 12th June, the day for the exchange was fixed to be 1ſt Nov. The parliament was prorogued 12th Aug. and met again 22d Nov.

Liſt of the ſitting member.

In the liſt delivered in by the ſitting member the voters were claſſed alphabetically, without any other arrangement or diſtinction, and the chriſtian and ſurname of the voter was all that was ſtated, except where there were more than one perſon of the ſame name, in which caſe, the place of abode was added. Oppoſite to the name of each voter, one or more objections were ſtated; ſometimes to the number of five or ſix. The objections were as follow:

Objections to the petitioner's votes.

1. No freehold.
2. No freehold as deſcribed on the poll.
3. No freehold of the yearly value of 40*s.* clear of rents and charges.
4. No freehold in the occupation of the tenant named on the poll.
5. No freehold in the hundred [or diviſion] in which he polled.
6. Not reſident as deſcribed on the poll.
7. Not aſſeſſed to the land-tax.
8. Not duly aſſeſſed to the land-tax.

[d] The interchange of theſe liſts is provided for in all caſes of Iriſh controverted elections, by ſt. 42 G. 3. c. 106. See the caſe of Waterford, *ante*, vol. I. p. 218.

9. Not

9. Not in poſſeſſion of his freehold twelve months before the election.
10. Voted for an annuity or rent-charge not duly regiſtered, or of which a certificate has not been duly entered.
11. Not 21 years of age at the time of voting.
12. A foreigner.
13. A pauper receiving alms.
14. Did not vote.
15. Convicted of wilful and corrupt perjury.
16. Bribed to give his vote.
17. Voted under undue influence.
18. Diſqualified by office from voting.
19. Occupier of the alleged freehold not ſpecified.

Liſt of the petitioner.

In Mr. Mainwaring's liſt of objections, the whole of the voter's deſcription upon the poll was inſerted. The liſt was arranged by hundreds and diviſions, and by pariſhes in each hundred and diviſion; the names in each pariſh being placed alphabetically. The following were the objections made; by comparing the figures ſet againſt them with the correſponding figures in the ſitting member's liſt, the reader will ſee how the liſts differ from, or agree with, each other.

Objections to the ſitting member's votes.

1. No freehold.
Eſtate held by copy of court roll.
Eſtate held for a term of years, truſtee not being in the actual poſſeſſion or receipt of the rents and profits.
Redeemed land-tax no title to vote.
Purchaſe of land-tax no qualification.
2. No freehold as deſcribed on the poll.
No freehold as deſcribed.
No ſuch freehold as deſcribed.
No ſuch place of freehold as deſcribed.
No ſuch freehold in the county of Middleſex.
No ſuch place of freehold in the county of Middleſex.
No ſuch ſtreet, [or, place] as ———
Place of freehold not known, [or, deſcribed.]
Place of freehold not duly, [or, ſufficiently] deſcribed.
Place of freehold not in the county.

Place

Place of freehold not in the county of Middleſex.
Freehold not ſufficiently deſcribed.
No ſuch place known in the pariſh as the voter has deſcribed as the place of freehold.
Nature of freehold not deſcribed.
Nature of freehold not ſufficiently deſcribed.

3. Freehold not of the yearly value of 40*s.* above all rents and charges.
Eſtate mortgaged, or otherwiſe incumbered.
Mortgagor, [or, voter] not in the actual poſſeſſion and receipt of the rents and profits.
Voter voted in right of his wife's dower, not being of the yearly value of 40*s.*, nor the voter in the actual poſſeſſion or receipt of the rents and profits to his own uſe.

4. No ſuch occupier as named, [or, deſcribed.]
No houſe in the occupation of the voter at ———
Occupier as deſcribed not tenant to the voter.
Occupier not ſufficiently deſcribed.
No ſuch occupier as voter has deſcribed.
No ſuch perſon as the occupier known.
No ſuch occupier known as deſcribed.
Neither voter nor occupier known in the pariſh.

5. There is no objection taken ſimilar to No. 5. in Sir Francis Burdett's objections.

6. The place of reſidence not ſufficiently deſcribed.
The voter's place of reſidence, and alſo the place of freehold, not ſufficiently ſet down and deſcribed.
No ſuch perſon at ——— as the voter or occupier are deſcribed.
No ſuch freeholder at ——— as the voter is, [or, has] deſcribed.
Voter's place of abode not duly, [or, ſufficiently] entered [or, deſcribed.]
Neither voter's place of abode nor place of freehold ſufficiently entered [or, deſcribed.]
Voter not known as deſcribed.
Voter's reſidence not known as deſcribed.
Voter's reſidence not deſcribed.
No ſuch place of reſidence as deſcribed.

Voter

Voter not known in the pariſh.
Places of voter's abode and freehold not ſufficiently deſcribed.
Voter not known in —— ſtreet.
Deſcription of reſidence inſufficient.
Voter not ſufficiently deſcribed.
Voter not known.

7, 8. Not duly aſſeſſed.

9. Not in the actual poſſeſſion or receipt of the rents and profits to his own uſe above twelve calendar months.

10. No certificate of annuity, or rent-charge, or memorial regiſtered purſuant to the ſtatute.

11. Voter under the age of twenty-one years.

12. [See No. 5.]

13. Voter received alms within twelve months before the election.
Voter received alms or parochial relief within twelve months, [or, a year] before the election.

14. The voter not the perſon repreſented.
The perſon repreſented did not vote.
Not the perſon repreſented.
This vote was given for Mr. Byng only.
No ſuch perſon as ——

15. Voter convicted of wilful and corrupt perjury.

16. Voter had reward, or promiſe of reward, contrary to law.
Voter had reward, or promiſe of reward, viz. by money, meat, drink, proviſion, or entertainment, contrary to law.

17. [See No. 5.]

18. Diſqualified by office in the revenue.
Diſqualified by office in the public revenue.

19. No occupier named, [or, ſtated.]
Nature and occupation of freehold not ſufficiently deſcribed.

20. Voter an idiot, or *non compos mentis*.

21. Freehold fraudulently granted on purpoſe to qualify the voter to give his vote.

22. Voter's chriſtian name wanting.

Chriſtian

Chriſtian name of voter not ſtated.
Chriſtian name of voter not ſufficiently ſet down and deſcribed.
Chriſtian name of voter not ſufficiently deſcribed.
23. Voter voted more than once.
Voter voted more than once at the election.
24. More than one perſon voted for this eſtate.
25. [To pariſh clerks.] Not duly appointed.
26. [Ditto.] Voter's licence not regiſtered.
27. [To clerk in orders.] Voter's licence not duly granted or regiſtered *.

How far parties confined to the objections ſtated.

It has already been obſerved, that the petitioner relied upon the objection of non-aſſeſſment only, although other objections were ſtated in his liſt to many of the voters for his antagoniſt. The ſitting member had uſually affixed ſeveral objections to the name of each voter. Theſe laſt were all read, as ſoon as the voter's name and deſcription upon

* See 2 Lud. 570. 574. 577. The following were the objections made by the petitioners, againſt the voters for the ſitting member, in the caſe of Middleſex, 1806. See *poſt*.
1. Voter not the perſon repreſented.
2. Voted more than once.
3. Bribed to give his vote.
4. Not reſident as deſcribed on the poll.
5. No freehold.
6. No freehold as deſcribed on the poll.
7. No freehold in the occupation of the tenant named on the poll.
8. Not aſſeſſed to the land-tax.
9. Not duly aſſeſſed to the land-tax.
10. Voted under undue influence.
11. A pauper receiving alms.
12. No freehold in the county of Middleſex.
13. No freehold of the annual value of 40s. clear of rents and charges.
14. Not in poſſeſſion twelve calendar months.
15. No freehold in the diviſion in which he polled.
16. No freehold in the hundred in which he polled.
17. Situation of the freehold not ſufficiently deſcribed on the poll.
18. Occupation of the alleged freehold not ſtated.
19. Voted for an annuity or rent-charge not duly regiſtered, or of which a certificate has not been duly entered.
20. Diſqualified by office from voting.
21. Did not vote for the ſitting member.
22. Not 21 years of age at the time of voting.
23. An alien.
24. Reſidence not ſufficiently deſcribed on the poll.
25. Voter illegally entered on the poll, after three o'clock in the afternoon of the 15th day of the election.
26. Nature of alleged freehold not deſcribed on the poll.
27. Nature of alleged freehold not ſufficiently deſcribed on the poll.
See the petitioner's liſt of objections in the caſe of Buckinghamſhire, 1785. 2 Lud. 602.

the

the poll had been read: but it ſoon appeared that not above one or two of the objections ſtated were meant to be inſiſted upon. The counſel for the petitioner having ſtrongly objected to this proceeding, as not directing them to what points their defence ſhould be addreſſed, and as leading to a great length of deſultory and irrelevant examination, the committee directed the following line to be adopted: namely, that when a voter's name was called, his counſel ſhould name the objections upon which they meant to rely: and that having named theſe objections, they ſhould not afterwards reſort to others, which they had not ſo named. For inſtance, it frequently happened, that where a voter had been objected to for non-aſſeſſment, for his freehold not being in the occupation of the tenant named on the poll, and for ſeveral other cauſes, and the counſel for the ſitting member had intimated that they meant to rely on the objection of non-aſſeſſment, it appeared from the croſs-examination of the aſſeſſor or ſome other perſon, called as a witneſs to account for the difference in the aſſeſſment, that the freehold was not in the occupation of the tenant named on the poll. In ſuch a caſe, the committee refuſed to enter into the queſtion of the occupation.

One of ſeveral objections relied upon.

New objection diſcloſed upon the croſs-examination of the witneſs called to ſupport the vote.

12th Mar. Robert Crigg. Objection; aſſeſſment. The witneſs called to anſwer the objection was croſs-examined by the counſel impeaching the vote, to prove, that the voter had given in a wrong occupier: this was objected to; and the committee determined, "that the counſel ſhould confine his examination to the ground of aſſeſſment, or to any thing which has ariſen out of the examination."

In conſequence of this determination, the counſel for the ſitting member, in all caſes where they named the objection of non-aſſeſſment, named that alſo of a wrong occupier, where it was contained in the liſt, in order to take the chance of what might come out upon the croſs-examination of the petitioner's witneſſes. This was objected to, (in the caſe of Daniel Sibſon, 28th April) by the counſel for the petitioner, who requeſted of the committee, that the croſs-examination might be confined to the point to which the witneſs was called, namely, the aſſeſſment: but the committee refuſed to accede to the requeſt. In the caſe of Brook Watſon, (1ſt May) who

The committee re-

was

was objected to both for want of aſſeſſment and for having given in a wrong occupier, another attempt was made to prevent the effect of theſe croſs-examinations, by requeſting the committee to decide ſeparately, and in the firſt inſtance, upon the queſtion of occupation, as the counſel for the ſitting member ſo frequently declined to produce witneſſes to ſubſtantiate that objection. But the committee determined, that they were entitled to avail themſelves of the benefit of their croſs-examination, upon any part of the caſe.

Refuſe to decide upon the objections ſeparately.

The reader will preſently ſee, that the committee conſidered themſelves bound to take notice of defects appearing upon the face of the poll, in the deſcription of the voters objected to, although ſuch defects had not been made ſpecific grounds of objection in the liſts.

Objections appearing on the face of the poll.

If, in the attempt to ſubſtantiate the vote, either by reconciling the aſſeſſment where it appeared contradictory to the entry on the poll, or explaining an apparent variance, the counſel defending, in the courſe of their examination of their own witneſſes, ſhewed a defect in the vote, the committee noticed it, and allowed the counſel impeaching the vote to addreſs their croſs-examination to any defect diſcloſed by the examination in chief, although the objection ſo diſcloſed, was not named by them, nor even contained in the liſt. As, for inſtance, to prove the aſſeſſment of Samuel Owen, *poſt.* an aſſeſſment was produced, where the occupier was duly aſſeſſed, but the name of a different proprietor appeared. In ſuch a caſe, by a rule of the committee, which will be mentioned hereafter, it became neceſſary to ſhew that the voter was the proprietor of the premiſes ſo aſſeſſed. To prove this, a conveyance to the voter was produced, from the date of which it appeared that he had not been 12 months in poſſeſſion; and this objection ariſing from the evidence in ſupport of the vote, the committee held it to be fatal, although it was not contained in the liſt of the oppoſite party, and therefore could not have been made the ſubject of evidence by them [f].

New objection diſcloſed by the party ſupporting the vote.

In

[f] The Bedfordſhire committee held that where the voter had deſcribed his freehold to conſiſt of a houſe and land, and it was objected to for non-aſſeſſment, upon its appearing to be in fact an annuity iſſuing out of land, advantage

In other caſes it appeared from conveyances introduced under ſimilar circumſtances, that the voter had taken an intereſt leſs than freehold. And the ſame rule was enforced upon many occaſions, in which it appeared from the evidence of the aſſeſſor who was called to reconcile the aſſeſſment, that the voter had given in a wrong place of reſidence, or a wrong deſcription of his freehold, &c. The rule was expreſſed in the following determination:—(1ſt March, vote of William Young.) "that although the objections made on the part of the petitioner to the votes of the ſitting member are confined to the ground of aſſeſſment, yet if in the courſe of the evidence given by the counſel for the ſitting member in defence of ſuch votes, any facts ſhould ariſe, tending to impeach the validity of ſuch votes, the committee will determine on the merit of ſuch votes, on the grounds, on which they ſhall have been ſo impeached [g]." They made a ſimilar determination on the ſame day in the caſe of John Thomas, who was objected to on the ground of aſſeſſment only. From the evidence adduced to remove the objection, it appeared that the voter had only been in poſſeſſion of his freehold ſince Lady-day 1802: and the vote was decided bad upon that ground. And in the ſame manner they ſtruck off the votes of the petitioner objected to by the ſitting member, for defects not named by the ſitting member in his liſt of objections, but diſcloſed by the petitioner in the evidence adduced in ſupport of the vote [h].

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tage might be taken of its not being regiſtered, though that objection had not been made. 2 Lud. 502. 504.

[g] It rather appears from Mr. Luders, 2 vol. p. 534. that the Bedfordſhire committee did not, in general, think themſelves authoriſed to notice objections not originally inſiſted upon by the parties. And ſee p. 541.

[h] The reader will already have remarked, that all the objections diſcuſſed in the trial of the cauſe till 9th April (except that of non-aſſeſſment) aroſe either upon the face of the poll, or upon the evidence diſcloſed by the witneſſes called to ſupport the vote: ſince the only objection inſiſted upon againſt the ſitting member's votes was non-aſſeſſment, and the trial of thoſe votes laſted till that day. The reporter has for the moſt part omitted to ſtate whether the objection was made in each caſe originally by the oppoſite party, or diſcloſed in the manner above-mentioned; except in thoſe caſes, where the manner in which the objection aroſe was a material part of the diſcuſſion.

The

The other deciſions of the committee, reſpecting the form and nature of the objections, were as follow:

25th Feb. Thomas Garman. In the liſt of objections on the part of Mr. Mainwaring, the chriſtian name of the occupier of the voter's freehold was ſtated to be George, inſtead of John, as ſtated on the poll. The committee would not ſtrike the voter's name out of the liſt, but proceeded to diſcuſs the objections. Name of the occupier wrongly deſcribed in the liſt.

25th Feb. Joſeph Tatem. The voter's reſidence was ſtated in Mr. Mainwaring's liſt to be Dilt, inſtead of Dyot-ſtreet. It was contended on the part of the ſitting member, that although it was not neceſſary to have ſtated the voter's reſidence at all, yet, where one party, in his liſt of objections, took upon himſelf to ſtate it, and ſtated it incorrectly, the committee would not ſuffer the objection to be proceeded in, ſince the other party, who was to ſupport the vote, might be miſled by this miſdeſcription. The committee over-ruled the objection, and proceeded to examine the vote. Reſidence of the voter wrongly deſcribed in the liſt.

29th Feb. Zachariah Bowman. The petitioner, in his liſt of objections, had claſſed this vote in the Finſbury diviſion. He had in fact voted in the Tower diviſion. The counſel for the ſitting member objected to the vote being called in queſtion; but the committee determined, "that the objection to entering into the conſideration of the aſſeſſment," (*i. e.* the objection made to the vote) "was not valid, but that the counſel might poſtpone it, till they came to the Tower diviſion [1]." Voter claſſed in a wrong diviſion.

1ſt March, Thomas Pierce. In the liſt of objections, Matthew Pierce. The committee determined, that his vote ſhould not be queſtioned. Voter objected to by a wrong chriſtian name.

12th March. Lucius Concannen. In the liſt of objections, Laurence Concannen. On the poll, the chriſtian name of the voter was perfectly illegible. The committee in this caſe, ſuffered the objections to the vote to be proceeded upon. *Id.* Where the poll is illegible.

[1] The principle of the deciſion in the three foregoing caſes was, that an error in the liſt of objections, in matters not neceſſary to be inſerted, and which in fact had in no inſtance been inſerted by the other party in his liſt, ſhould not obſtruct the ſcrutiny of the votes. See the deciſion of the Bedfordſhire committee in the caſe of Stanley Burrough, 2 Lud. 418. which ſeems *contrà*.

Voter objected to by a wrong ſurname.

27th March. Humphry Tunkinſon, one of the Mill-voters, was objected to by the name of Henry Tomkinſon. The counſel for the petitioner contended that this vote ought to be ſtruck off, without any further proof; it appearing upon the face of the poll, that it had been given in reſpect of the ſame property, as thoſe of the other Mill-voters, againſt whom a reſolution of the committee had already been paſſed. The committee determined, that the vote of Humphry Tunkinſon, not being objected to by the petitioner, is not brought under conſideration.

Freehold out of the county given in evidence under the objection of no freehold, &c.

24th April. John Taylor. Objections; "no freehold; no freehold as deſcribed on the poll; no freehold in the diviſion for which he voted." It was propoſed to ſhew that the premiſes for which he had voted were ſituated in the city of London, and not in the county of Middleſex: it was inſiſted, that it was not competent for the party objecting, to give any ſuch proof, ſince this had not been included in the liſt of objections. But the committee reſolved that the evidence might be received; and the premiſes being ſhewn to be in London, and not in Middleſex, the vote was declared bad.

But not, poſſeſſion within 12 months, under the objection of no freehold;

27th April. William Abud. He was objected to as having no freehold; and as having no freehold as deſcribed on the poll. The witneſs who was called to eſtabliſh theſe objections, was aſked whether the premiſes had not been conveyed to the voter within a year previous to the election. The committee determined that ſuch evidence, not applying to the objections given in, ſhould not be entered into.

Nor, a wrong occupier, under the objection of no ſuch freehold as deſcribed.

30th June. Richard Friday. The objections relied on were, "no freehold; no freehold as deſcribed on the poll; not duly aſſeſſed." He had voted for land in his own occupation. The aſſeſſor was called to explain the aſſeſſment; and was aſked in his croſs-examination by the counſel who impeached the vote, if Friday had any land in his own occupation? It was ſaid that this queſtion ought not to be put, becauſe it pointed to another objection, which had not been made; namely, that the voter had no freehold in the occupation of the tenant named on the poll. It was anſwered, that the queſtion tended alſo to

ſhew, that he had no ſuch freehold as he had deſcribed on the poll: but the committee determined, that the queſtion ſhould not be put.

30th June. Edward Batsford. He voted for a ſhare in Fulham Bridge. Objection, "not aſſeſſed." In the aſſeſſment, the property was rated in the name of the proprietors of Fulham Bridge. It therefore became neceſſary to ſhew that the voter was a proprietor *, and a conveyance was produced to Edward Batsford, dated 1799. The counſel who objected to the vote, propoſed to ſhew, that this Edward Batsford, to whom the conveyance was made, was not the ſame perſon who had voted at the election. The committee rejected this evidence, ſince no ſpecific objection had been made that the voter had no freehold, or, no ſuch freehold as deſcribed on the poll. It was then propoſed to ſhew that the voter had ſold his freehold before the election: but the committee determined, "that no doubt ariſing on the face of the deed put in by the petitioner," (to anſwer the objection of non-aſſeſſment) "no evidence ſhould be received to contradict the purport of it, or to ſhew that the voter had no freehold [k]."

The identity of the voter not to be queſtioned under the objection of non-aſſeſſment.

* See p. 68.

Nor proof allowed of his having ſold his eſtate.

[k] Under the objection of non-aſſeſſment, the Houſe, in the Oxfordſhire caſe, 1755, refuſed to receive evidence, that part only of the freehold for which the vote was given was aſſeſſed, and that that part was under 40s. *per annum*. 27 Jour. 72. It does not appear, however, that they conſidered the ſtatute complied with, if a part only of the voter's freehold, under the value of 40s., were aſſeſſed: for they afterwards (p. 181.) reſolved to admit evidence that part only of the freehold voted for, was aſſeſſed to the land-tax, and that ſuch part was not of the clear yearly value of 40s. The Gloucesterſhire committee reſolved, in the words of the caſe of Yorkſhire 1735, 22 Jour. 604. that the counſel be permitted to give evidence of the voter's having no freehold at all, to whom the objection was, that he had not a freehold of the annual value of 40s. p. 105. (The ſame reſolution was made in the caſe of Oxfordſhire, 1755, 27 Jour. 172.) They determined, p. 122. "that the objection taken to the voter being, that he had no freehold eſtate in the premiſes for which he voted, and it appearing in the poll-book that he voted for a rent reſerved out of lands, the counſel be reſtrained from offering evidence to prove that his freehold conſiſted of a rent-charge;" (and not regiſtered.) p. 128.: that under the objection of no freehold in the premiſes voted for, evidence might be given that he had no freehold in the pariſh named on the poll. Where the objection was "not aſſeſſed," they permitted the party ſupporting the vote, to ſhew an aſſeſſment in a different pariſh from that named on the poll. p. 185.

IV. Queſtions relating to the deſcription of the voter upon the poll.

1. General reſolutions of the committee with reſpect to the entries on the poll.

No evidence to correct the poll. See *poſt*.

With reſpect to the deſcription of the voter upon the poll, the committee determined not to admit any evidence to correct the poll, by ſhewing that the voter had given a different deſcription from that which had been taken down by the poll-clerk [l]. Where the name, &c. taken down by the poll-clerk, bore a ſimilarity in point of ſound to the real deſcription of the voter, the committee decided in each caſe, whether the difference ſhould be conſidered to be the miſtake of the clerk, or a miſdeſcription on the part of the voter; and in all caſes where the ſimilarity of ſound was ſuch as to juſtify them in the former ſuppoſition, they allowed the vote. See *poſt*, head of Aſſeſſment.

Idem ſonans.

Objections upon the face of the poll, not ſtated in the liſts of objections.

2d March. They reſolved, that when the particulars of deſcription on the poll did not appear to comply with the forms preſcribed, the committee would decide on the validity of ſuch deſcription: and, that unleſs the deſcription required [m] under the different heads on the poll-book appeared complete on the poll, the vote ſhould be rejected:" that is, although the inſufficiency of the deſcription had not been made a ground of objection by the oppoſite party, in the liſts delivered. Theſe reſolutions were made in the caſe of

[l] The Glouceſterſhire committee reſolved, p. 139. not to admit evidence to contradict the deſcriptions or entries in the poll book, but they allowed evidence to explain them. They alſo permitted evidence to be given that a voter had been ſworn, although the word *jurat* was not ſet againſt his name. p. 163. The Bedfordſhire committee received parol evidence to correct the poll. See 2 Lud. 403. and 1 Lud. 377. In the Oxfordſhire caſe, 1755, 27 Jour. 285. the Houſe refuſed to receive the evidence of a check book, or parole evidence, to ſhew that the voter had voted for a freehold lying in a different place from that which is entered in the *original poll-book*: or that the voter had named a different occupier. Reference was made to the caſes of Rutland, 20th Jan. 1710, and Bedfordſhire, 14th July, 1715.

[m] The Glouceſterſhire committee determined that ſuch a defective deſcription (*e. g.* where the voter had not ſpecified his tenant) was a *primâ facie* objection ſufficient to put the petitioner on proving the neceſſary qualifications to entitle him to vote. p. 93. They alſo determined "that it was neceſſary for every freeholder at the election, when he polled, to give in the name of the pariſh, hamlet, townſhip, tithing, or place, in which his freehold is ſituate." p. 140.

Thomas

Thomas Mapleſon, who had cauſed the word "unknown" to be inſerted in the column of occupiers in the poll[n]. It was argued in ſupport of his vote, that the ſtat. 18 G. 2. c. 18. ſ. 1. was in this reſpect only directory, and contained no proviſion for making the vote void, if the occupier's name was not ſpecified. 2. That the committee would not take upon themſelves to decide queſtions not ſubmitted to them by the parties, and upon points which had not been made the grounds of objection. On the other ſide it was ſaid, that the committee, if they perceived, by the entry upon the poll itſelf, that the vote was bad, could not ſuffer it to remain there; that in caſes where the freeholder's oath was required to be given, the voter was obliged by ſtat. 18 G. 2. c. 18. to give in the name of the occupier upon oath, before he was permitted to vote; and therefore, that in this caſe, ſince he had not given in any occupier, it was clear that his vote ſhould not have been received. At the election, every voter had taken the freeholder's oath.

2. Inſufficient deſcription of the reſidence of the voter.

10th April. James Jenkins. Reſidence, "London." It was ſuggeſted that this was too general, and it was ſaid that the committee would take notice of this defect, as it appeared upon the face of the poll: ſee *ante*, p. 52. But as this was the firſt queſtion that had been made with reſpect to the deſcription of reſidence, and the objection had not been taken to any of the votes for the ſitting member, the committee determined, that they would not now take that ſubject into conſideration, unleſs it ſhould appear, (as it did not in this caſe,) that the vote was ſpecifically objected to upon that ground, in the liſt delivered in by the ſitting member.

12th June. Peter Holford. The voter deſcribed himſelf "Maſter in Chancery;" without adding any place of Office.

[n] The columns in the poll-book correſponding with the directions of the ſt. 18 G. 2. c. 18. ſ. 1. (ſee *ante*, p. 20.) were as follow:

Voter's name. | Reſidence. | Situation of freehold | Nature thereof. | Occupier's name. |

The Bedfordſhire committee did not conſider a ſimilar defect of deſcription ſufficient to invalidate the vote. See the caſe of Ch. Cheſter, Eſq. 2 Lud. 413. He had named as his occupiers, "ſeveral perſons."

his abode. The committee held this deſcription defective, and the vote bad.

Incumbency.

23d April. Rev. T. Farmer. In the column of reſidence, "Rector of St. Luke's." This was held ſufficient: and in all caſes, the name of the pariſh was held a ſufficient deſcription for the incumbent either as to the ſituation of his freehold, or his reſidence. And ſee *poſt*, vote of Rev. G. Harpur, p. 56.

Inſufficient deſcription of the ſituation of the voter's freehold.

The name of a pariſh in the metropolis too general a deſcription.

3d March. Richard Lloyd. Situation of freehold, St. Giles's. The committee determined, upon this occaſion, "That the name of the pariſh, without a more particular local deſcription, is not ſufficient, within this metropolis"*. On the 5th of March, the counſel for the petitioner made an application to the committee to reſcind this reſolution, ſince it would prove deſtructive to the votes of a great many perſons, who were real freeholders; or at leaſt to qualify it, by throwing the burden upon the party for whom the vote was given, to ſhew where the freehold of perſons, who had given in ſuch a general deſcription, was actually ſituated. The committee determined, "that they did not ſee ſufficient reaſon to alter the reſolution." But they afterwards relaxed it in caſes where the freehold conſiſted of land.

Liberty of the Rolls.

1ſt May. David Ciddel deſcribed the ſituation of his freehold (a houſe) to be the Liberty of the Rolls, a diſtrict forming a ſmall part of the pariſh of St. Dunſtan's, and containing about 350 houſes. The committee held this deſcription to be ſufficient.

Inſufficient deſcription of the nature of the voter's freehold.

Deſcribed in another column on the poll.

30th March. John Meadowcroft. In the column of "the ſituation of the freehold," the voter cauſed to be inſerted, "Exigenter of the Common Pleas;" leaving blanks in the columns of "the nature of the freehold," and of "the name of the occupier." The deſcription was held ſufficient.

* This rule is to be underſtood with exception of ſuch caſes as that of Mr. Farmer, *ſupra*.

8th

8th June. —— Meade. Nature of freehold, "Tenement." It was objected that this deſcription was uncertain, and would apply to any ſpecies of freehold; but the committee reſolved to take it in its more familiar ſenſe, as a houſe, and held the deſcription to be ſufficient. "Tenement."

19th June. Joſeph Jefferſon, deſcribed the ſituation of his freehold to be "St. Anne's, Soho;" and the nature of it, "Preferment in the church." The committee held this deſcription to be ſufficient; but required of the party who ſupported the vote, to ſhew the kind of perferment, in reſpect of which Mr. Jefferſon claimed a right to vote. Preferment in the church.

20th June. Edward Taylor. Nature of freehold, "Part of a meſſuage." It was ſaid that this appeared from the deſcription given by the voter himſelf on the poll to be a ſplit vote, and contrary to the ſtat. 7 & 8. W. 3. c. 25. ſ. 7., which enacts, "that no more than one ſingle voice ſhall be admitted to one and the ſame houſe or tenement;" and that although joint-tenants, and tenants in common, (perhaps by too liberal a conſtruction of the ſtatute) had been permitted to vote in reſpect of their undivided intereſt, yet there had been no inſtance of a vote being admitted (for a county) in reſpect of a diſtinct and ſeparate portion of a houſe. The counſel who ſupported the vote began to contend, that it was incumbent upon the other ſide, in order to bring this caſe within the ſtatute of W. 3., to ſhew that another vote had been given in reſpect of the other part of the houſe; but the committee deſired them to prove, if they could, that the voter was a joint-tenant, or tenant in common, of the whole houſe; and it being ſhewn accordingly that he was a joint-tenant of the whole houſe, the vote was declared good. "Part of a meſſuage," a good deſcription for a joint-tenant of the whole houſe.

Inſufficient deſcription of the occupier of the voter's freehold.

2d March. Thomas Mapleſon. Occupier, "unknown." It has been already obſerved, that this was held an inſufficient deſcription: as was alſo (29th March. Vote of W. Shepherd,) occupier, "Nos. 3 & 4." Occupier, "unknown" bad. "No. 3 and 4."

In general, ſome occupier muſt be named.

26th May. George Whytock. In the column of occupiers, a blank. It was ſuggeſted, that this defect might be taken to be owing to the remiſſneſs of the poll-clerk, who had neglected to aſk the voter for the name of the occupier; and that the former deciſion of the committee was founded upon the apparent neglect of the voter himſelf. The committee however were of opinion that this was a fatal defect, and fell within their reſolution of 2d March. *Vide ante*, p. 52.

Caſe, where no occupier need be expreſsly ſtated.

29th May. Rev. G. Harpur. Situation of freehold, "Stepney:" nature of it, "Rectorſhip," and no occupier inſerted. The committee held the deſcription to be ſufficient. See *ante*, p. 54, votes of Rev. T. Farmer, and of John Meadowcroft [p].

3. Untrue deſcription of the reſidence of the voter.

The place where the voter ſleeps muſt be given in as his reſidence.

March 17th. J. W. Vaughan. Reſidence, "Prince's-ſtreet." It appeared that he carried on his buſineſs in Prince's-ſtreet, but that he ſlept in Orange-court, where his freehold was; and where another perſon lived as a lodger. The committee decided the vote to be bad.

Untrue deſcription of the ſituation of the voter's freehold.

Immaterial difference.

9th April. James Croſs. Situation of freehold, "John-ſtreet, St. Sepulchre." It was ſituated in St. John-ſtreet. Evidence was given that no ſtreet in the pariſh of St. Sepulchre was named John ſtreet. The committee held the difference to be immaterial, and decided the vote good.

Popular deſcription.

31ſt May. John Hitchins. Situation of freehold, "Greenfield-ſtreet, Whitechapel." Part of the ſtreet is in Whitechapel, and part in Mile End Old Town. This property was in fact in the latter, but very near Whitechapel. The aſſeſſor ſaid, that although perſons who well knew the boundary, would make a diſtinction, yet that the whole ſtreet was more generally and popularly called Greenfield-ſtreet, Whitechapel; that the premiſes were aſſeſſed in Mile

[p] See 2 Lud. 413.

End;

End; and that a mark was made in the ſtreet at the diviſion between Mile End and Whitechapel. In ſupport of the vote, it was contended, that the popular deſcription was even better than the legal deſcription, ſince the object of the ſtatute was to direct the ſearch of thoſe who might inquire after the voter. On the other ſide it was ſaid, that the legal deſcription was neceſſary, in order to ſatisfy the terms of the oath. The committee determined the vote to be good.

4th July. Mark Burr. Situation of freehold, "Uxbridge." Uxbridge is a townſhip of the pariſh of Hillingdon, aſſeſſed ſeparately to the land-tax, and to the poors'-rate. Part of the principal ſtreet of Uxbridge runs into the townſhip of Hillingdon; this part, when it is neceſſary to diſtinguiſh, is called Hillingdon-end; but in common language it is ſpoken of as part of Uxbridge. The premiſes, for which the voter had voted, were ſituated in this part of the townſhip of Hillingdon, but the committee conſidered the deſcription to be ſufficient.

— March. John Nixon. Situation of freehold, "Collins's-court, Wapping." It appeared that Collins's-court was in Shadwell, and the committee declared the vote to be bad [q].

Polling in the wrong hundred.

It may be proper here to mention the determination of the committee, upon a caſe, in which the voter had polled in a booth belonging to a hundred in which in fact he had no freehold.

16th April. John Baker was objected to as not being duly aſſeſſed, and as having no freehold in the hundred for which he polled. He had voted in the hundred of Edmonton for a freehold in Hackney; which is ſituated in the Tower diviſion of the Oſſulſtone hundred. It was proved that the names of the different hundreds were affixed, in

[q] In the Oxfordſhire caſe, 1755, 27 Journ. 277. the Houſe refuſed to permit the party ſupporting the vote to ſhew that the voter had a freehold in a different pariſh from that in which he deſcribed it at the poll to be ſituated; or in a different hundred, from that in which he had voted. *Ib.*

The Bedfordſhire committee held it to be a fatal objection that the voter had given in a wrong pariſh. 2 Lud. 416.

large

large letters, to the different booths, and that printed liſts of the pariſhes contained in each hundred were diſtributed at the huſtings.

St. 18 G. 2. c. 18. ſ. 7 & 8.

By the ſtat. 18 G. 2. c. 18. ſ. 7. the ſheriff is required to affix on the moſt public part of each booth the name of the hundred, &c. for which the ſaid booth is deſigned; and by ſ. 8. it is enacted, that he ſhall not "admit any perſon to vote for any lands, tenements, or other freehold eſtate, ſworn by the ſaid oath to be lying and being at ſome pariſh, town, or place, or pariſhes, towns, or places, which pariſh, town, or place, or pariſhes, towns, or places, or any of them, or any part of them, is not or are not mentioned in the liſt ſo made out for ſuch booths or polling places as aforeſaid, unleſs ſuch lands, tenements, or eſtate lie or be in ſome town, liberty, or place not mentioned in any of the liſts ſo made out for all the ſaid booths, or polling places as aforeſaid."

It was contended, that this miſtake was fatal to the vote. That the voter was bound to proceed to that booth which was allotted to the particular hundred where his freehold lay: that the ſtatute was not only directory to the ſheriff, but binding on the elector alſo; and intended as well to prevent confuſion at the poll, as to facilitate the inquiry after his eſtate, in caſe his vote ſhould become the ſubject of a ſcrutiny. They cited the caſe of D. Reynolds, 2 Lud. 420. where the voter polled in the hundred of Flitt for a freehold in the hundred of Willey; and the vote was held to be bad: and of Robert Willan, 2 Lud. 510., and John Oliver's, *ib.* 414[r].

It was anſwered, that the object of the ſtatute was not to facilitate inquiry; for that purpoſe was fully anſwered by the very particular deſcription which the voter was bound to

[r] His vote was received in the wrong hundred, and entered as ſituate in a certain pariſh, in which it was not; the pariſh in which it was ſituate not being compriſed in the hundred where his vote was received. He was admitted as a witneſs to prove that he named the right pariſh; but the vote was decided bad. And ſee a ſimilar reſolution, p. 420. See alſo the Glouceſterſhire caſe, p. 120., where it was determined, that the voting in the wrong booth was the fault of the poll-clerk, and did not vitiate the vote.

give

give of himſelf, and his freehold at the poll, upon oath: that it was a direction addreſſed to the ſheriff, and to the candidates; but not communicated to the voter. It was the duty of the ſheriff to ſend the voter round to the proper booth, as was the caſe with reſpect to D. Reynolds, whoſe vote was declared void, becauſe he did not give his vote in either hundred. In the caſes of Willan and Oliver, the former voted in right of premiſes for which he was not aſſeſſed: the latter, for a pariſh in which he had no freehold. But there was an inſtance in the caſe of Glouceſterſhire, p. 120. exactly in point with the preſent: "Benjamin Peirce. Objection, no freehold; the place he voted for not being in the liſt, in the booth where he polled. As the poll clerk had admitted him to vote, though contrary to the directions of the act, the committee were unanimous that he ought not to loſe his vote, and therefore over-ruled the objection."

The committee determined, "that a voter who has been admitted by the ſheriff or the poll clerk to vote at the wrong booth, does not thereby loſe his vote."

The counſel for the petitioner applied to poſtpone the conſideration of ſeveral votes objected to in the ſame circumſtances. The objections were called on in the hundreds for which they voted; but it was requeſted that their caſes might ſtand over, till the votes of thoſe hundreds were called on, in which they ought to have voted. The committee conſented that they ſhould ſtand over.

Baker's vote was admitted to be bad, for want of aſſeſſment.

Untrue deſcription of the nature of the voter's freehold.

31ſt May. John Barfoot. Nature of freehold "Land." The premiſes were proved to conſiſt of a ſtable and cart-ſhed, with no more land adjoining, than a very ſmall ſlip, not above 6 feet broad. The committee were of opinion that the freehold was improperly deſcribed as land, and determined the vote to be bad. A ſmall yard appertaining to a building, ill deſcribed as land.

5th June. William Clappeſon. Nature of freehold, "Houſes and land." Situation, "St. Georges in the Eaſt." This deſcription was defective for the houſes, under the reſolution Same point.

ſolution of the committee, 3d March. See *ante*, p. 54. With reſpect to the land, it was proved to conſiſt merely of two ſmall gardens appertaining to the houſes: which the committee did not conſider to come ſufficiently within the deſcription of land, and determined the vote to be bad.

Share in a bridge, well deſcribed as "rent."

30th June. Thomas Foſter. Nature of freehold "rent." He voted for a ſhare in Fulham Bridge. Certain perſons, by ſt. 12 G. 1. c. 36. (A. D. 1725) were appointed commiſſioners for the erecting and repairing Fulham Bridge, over the Thames from Fulham in Middleſex to Putney in Surrey, and a power was given to the Crown to incorporate them. In fact they never had been incorporated, but ſome years afterwards they conveyed by leaſe and releaſe the whole of the bridge, together with the tolls, profits, &c. to certain perſons (in 30 ſhares, of which the voter had two) in conſideration of their repairing and maintaining the bridge. It was contended that theſe ſhares were not properly deſcribed by the word rent, which ſignifies (as applied to a voter) ſomething which he has, charged on land, where he has not the land itſelf. Here the voter had a freehold in the land itſelf, upon which the bridge ſtood, and on which the profit aroſe, and therefore he ſhould have called it a ſhare in the bridge, and not a rent. It was anſwered, that although it might have been called land, or a ſhare in the bridge, ſtill there was no impropriety in calling it a rent; that the word rent was not to be taken in its legal ſenſe; for the ſtat. 18 Geo. 2. c. 18. ſ. 1. requires every voter to ſwear he has been in the poſſeſſion of the *rents* and profits of his freehold for above 12 months, which could never be true in the caſe of a perſon who occupies his own land, if the word rents were to be conſtrued ſo ſtrictly; that therefore the voter muſt be taken to mean the profits of his ſhare of the bridge and of the tolls thereof, which in the popular ſenſe of the word might be called a rent. The committee decided the vote to be good.

Rent-charge, as a "fee-farm rent."

2d July. William Bennett. Nature of freehold "fee farm rent." It appeared in fact to be a rent charge, granted to the voter for life, and had been duly regiſtered. The vote was held good.

Untrue

Untrue deſcription of the occupier.

27th February. Hayman Dyſon. Occupier, "Self." It appeared that the occupiers were, the voter, and Charles Dyſon. Upon this occaſion it was agreed between the parties, and adopted as a rule by the committee, that where a voter, having two or more tenants, gives in the name of one of them only, it is ſufficient. *One occupier, given in, out of two or more, ſufficient.*

In ſeveral inſtances where the voter had given in the name of a former occupier, and it was proved that another perſon was in fact the occupier at the time of the election, the vote was diſallowed. *A former occupier, bad.*

19th March. Daniel Wiltſhire. Occupier, "Charles Oſborne:" which was ſaid to be a miſtake for John Oyſton. John Oyſton being examined as a witneſs, ſaid that he had paid rent to the voter for nine years, and that no perſon of the name of Oſborne lived in the ſame ſtreet with himſelf. The committee decided the vote to be bad. *Wrong occupier.*

16th April. Charles Stable. Occupier, "John Harding." The name of the occupier was in fact, Thomas Harding. This had not been made a ground of objection to the voter, but was diſcloſed upon the examination of witneſſes called to remove ſome other objections. The committee determined the vote to be bad for want of the true occupier being ſtated. *Wrong chriſtian name.*

19th April. Robert Harry Sparks. Occupiers, "Gale and Webb." Theſe were the perſons to whom the voter had demiſed the houſe. It appeared however that no perſon was in the actual occupation of it at the time of the election. It was contended in ſupport of the vote, that ſince there did not appear to be any under-leſſee, or any perſon in the occupation of the freehold, different from thoſe ſtated by the voter, he had done right in ſtating the original leſſees, his tenants, as the occupiers. The committee determined the vote to be good. *The leſſee of a houſe rightly named as occupier, though he did not reſide there.*

27th June. Robert Kentiſh. Occupier, "——Evans." It was proved that the houſe was empty at the time of the election; and no evidence was given of Evans being a leſſee. The committee determined the vote to be bad. *An occupier named when the houſe was empty.*

The

Under-leſſees.

The committee determined in ſeveral inſtances that where a voter gave in his original leſſee, and it appeared that the leſſee had underlet the premiſes to others, the deſcription was defective, and the vote bad. Where it appeared, however, that the premiſes were only let to weekly tenants, it was determined that ſuch perſons need not be given in as occupiers, and it was held ſufficient to ſtate the original leſſee, or the voter's ſelf, (if there had been no other letting,) as the occupier. This was determined in the caſe of Thomas Moore Foſket, 23d April: but in the caſe of —— Longuet, who gave in as his occupiers, certain perſons who held the premiſes of him by the month, it was objected that he ſhould have given in himſelf as the occupier, conformably to the principle of the above determination; but it was reſolved, that the deſcription was ſufficient.

Weekly tenants.

Monthly tenants.

Many caſes occurred where the name of the occupier on the poll was not exactly the right name of the actual occupier, but bore a greater, or a leſs reſemblance to it. The queſtion upon theſe occaſions was, whether the variance was ſuch as was likely to have happened from the miſtake of the poll-clerk in taking down the real name of the occupier as it was ſtated to him by the voter, or from the voter naming a different perſon. In doubtful caſes, evidence was frequently given, againſt the vote, to ſhew that perſons of the name which appeared on the poll had formerly lived in the premiſes, or in the neighbourhood, or were otherwiſe connected with the voter; and in ſupport of the vote, that theſe circumſtances did not exiſt: as in the caſe of Daniel Wiltſhire, *ante*, p. 59. It is needleſs to multiply particular inſtances of this kind.

Similarity of ſound.

Tenant of other premiſes than thoſe voted for.

23d April. Robert Lloyd, voted for premiſes in Golden Lane, in the occupation of "Hooker and others." His freehold conſiſted of two houſes, one ſituated in Golden Lane, the other in Hand Court, with a yard between them. Hooker, whom he named as the occupier, occupied that in Hand Court only. There were ſeparate aſſeſſments for Hand Court, and Golden Lane. The committee determined the vote to be bad.

19th

19th May. John Fiſher. In the occupier's column, "under repair." The committee held this to be ſufficient, and ſaid they would take this to mean that the premiſes were in the voter's own occupation. "Under repair."

11th April. John Merrington. Occupier on the poll, "Self." Objection, "No freehold in the occupation of the tenant named on the poll." In ſupport of the objection, the aſſeſſment was produced, in which the name of John Gray was entered as the tenant. The committee held this to be no evidence that the voter had given in a wrong occupier. Book of aſſeſſment no evidence of a wrong occupier.

IV. Queſtions ariſing from ſtatutes requiring the aſſeſſment of the voter's freehold to the land-tax.

1. Not aſſeſſed as deſcribed on the poll; in the name of the owner, or tenant.

In order to enable the reader more diſtinctly to comprehend the following caſes upon the ſubject of aſſeſſment to the land-tax, a view will in the firſt place be preſented to him, of the ſeveral ſtatutes by which the aſſeſſment of the voter's property has been required, and in the ſecond place, a ſhort account of the principles adopted by the committee, and of the courſe of their proceeding in the application of the ſtatutes in force at the time of the trial of this petition. General view of the ſtatutes, and of the rules of conſtruction adopted by the committee.

By ſtat. 10 Ann. c. 23. ſ. 2. it is enacted, that no perſon after 1ſt May 1712, ſhall vote for a knight of the ſhire, (in England) "in reſpect or in right of any lands or tenements, which have not been charged or aſſeſſed to the public taxes, church rates, and pariſh duties, in ſuch proportion as other lands or tenements of forty ſhillings *per annum*, within the ſame pariſh or townſhip where the ſame ſhall lie or be, are uſually charged." By ſtat. 12 Ann. c. 5. it is ſufficient, if they are charged to ſome one or more of thoſe taxes, &c. [1] The object of the former ſtatute appears from the pream- Statutes. 10 Ann. c. 23. 12 Ann. c. 5.

[1] It is propoſed at preſent, only to mention the general enactment of theſe ſtatutes: the exceptions, or modifications, which have been applied to particular caſes, will be taken notice of hereafter.

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ble of the ſtat. 12 Ann. c. 5. to have been only "to aſcertain the value of lands or tenements, by making the proportion paid to the public taxes, church rates, and pariſh-duties, or ſuch of them to which the ſame were uſually charged or aſſeſſed, the meaſure of the value thereof." The beforementioned clauſe of 10 Ann. c. 23. was repealed by ſtat.
18 G. 2. c. 18. 18 G. 2. c. 18. ſ. 2; and by ſ. 3. it was enacted, that after 24th June 1745, no perſon ſhould vote for a knight of the ſhire, (in England, or Wales) "in reſpect or in right of any meſſuages, lands, or tenements, which have not been charged or aſſeſſed towards ſome aid granted, or hereafter to be granted to his Majeſty, his heirs, or ſucceſſors, by a land-tax in Great Britain, twelve calendar months next be-
20 G. 3. c. 17. fore ſuch election." The ſtat. 20 G. 3. c. 17. ſ. 1. without noticing any of the prior acts, further than to obſerve that they are difficult to be carried into execution, enacts, that after 1ſt January 1781, no perſon ſhall vote for a knight of the ſhire, (in England or Wales) in reſpect of any meſſuages, lands, or tenements, which have not, for ſix calendar months next before ſuch election, been charged or aſſeſſed towards ſome aid granted or to be granted to his Majeſty, his heirs or ſucceſſors, by a land-tax, (in caſe any ſuch aid be then granted and aſſeſſable,) in the name of the perſon or perſons who ſhall claim to vote at ſuch election for or in reſpect of any ſuch meſſuages, lands, or tenements, or in the name of his or their tenant or tenants, actually occupying the ſame as tenant or tenants of the owner or landlord
30 G. 3. c. 35. thereof." The ſtat. 30 G. 3. c. 35. reciting the above-mentioned clauſe, and that "the form of aſſeſſment preſcribed by the ſaid act (20 G. 3.) and thereunto annexed, denotes that the names, both of the proprietor, and of the occupier, ought to be ſpecified; and doubts have ariſen, whether, if ſuch form be not ſtrictly purſued, the ſuffrage of the perſon claiming to vote be admiſſible;" requires only (ſect. 1.) that the freehold ſhall have been aſſeſſed for 6 calendar months before the election in the name of the perſon claiming to vote "although the name of the tenant or tenants actually occupying ſuch meſſuages, lands, or tenements, ſhall not be inſerted in ſuch aſſeſſment, according to the form

form of aſſeſſment to the ſaid firſt recited act annexed;" or, (ſect. 2.) "in the name of a tenant or tenants actually occupying the ſame at the time of ſuch aſſeſſment being made, although the name of the perſon ſo claiming to vote &c. ſhall not be inſerted in the aſſeſſment, according to the form of the aſſeſſment to the ſaid firſt recited act annexed."

In this caſe, the election was held in July 1802: the aſſeſſment made laſt before the election, having been made within the 6 months, (25th March, 1802) of courſe, furniſhed no evidence as to the aſſeſſment of the voter's property for the time required by the law: recourſe was therefore had to the aſſeſſment of the preceding year, which was made from 25th March, 1801. Not one inſtance occurred of a freeholder having procured his own or his tenant's name to be inſerted in the rate, by the mode of appeal pointed out by ſt. 20 G. 3. c. 17. ſ. 3. It very ſoon became a queſtion, whether the ſtatute 30 G. 3. c. 35. applied to caſes where a different proprietor, or occupier, appeared upon the poll, from thoſe named in the aſſeſſment. It was ſuggeſted by one of the learned counſel for the petitioner, that the ſtatute was meant to extend to ſuch caſes only, where one of the two (namely the proprietor, or occupier) was rightly named, and the other wholly omitted in the aſſeſſment; and not to thoſe caſes, where one of the two was rightly named, but where the name of the other appeared upon the aſſeſſment to be different from that given in at the poll; as for inſtance, where the occupier being right, but a different perſon being named in the aſſeſſment as the proprietor, the ſtrongeſt ſuſpicion aroſe, that the occupier was rated, not as tenant to the voter, but to another perſon. But after ſome diſcuſſion, the conſtruction contended for by the counſel for the ſitting member was adopted, and the following rule was entered upon the minutes of the committee by the agreement of both parties, namely, "That if either the name of the owner, as owner, or that of the occupier, as occupier, of the freehold voted for, appears rightly upon the aſſeſſment; that is, if either be right, although the other be wrong, ſuch voter ſhall be

Aſſeſſment. March 1802.

Aſſeſſment in the name of a different proprietor or occupier.

deemed rightly aſſeſſed [t]." This reſolution was made 25th February, in the caſe of Thomas Garman. He had at the poll given in as his occupier John Garman. On the aſſeſſment, Ann Garman appeared as the proprietor, and John Garman as the occupier. His vote was declared good.

The ſame perſon differently deſcribed.

It frequently happened, that the owner or tenant was aſſeſſed by a name differing from that which appeared on the poll (although the aſſeſſment was really meant to be made upon the ſame perſon) either by the chriſtian name being different, or omitted, or put with the initials only, or by

[t] It may alſo aſſiſt the reader, to lay before him a ſhort account of the principles upon which the Bedfordſhire, Cricklade, and Buckinghamſhire committees (in 1785) are reported by Mr. Luders to have proceeded with reſpect to the queſtion of aſſeſſment. He is referred for a fuller expoſition of them to Mr. Luder's ſecond volume, and to the arrangement of the law upon the ſame ſubject, by Mr. Serjt. Heywood, in his firſt volume, p. 112 to 145. It will be recollected that the ſtat. 30 G. 3. c. 35. had not then been paſſed. See 1 Heyw. Pref.

The Bedfordſhire committee reſolved, (upon ſtat. 20 G. 3. c. 17.) "That it is not neceſſary that the form of the ſchedule ſhould be ſtrictly complied with;" "that the owner's name muſt appear on the aſſeſſment, either as the perſon aſſeſſed, or as owner of the land for which the tenant is aſſeſſed." p. 497. From this rule, however, they made ſome exceptions, in the caſe of perſons, who had freeholds ariſing from certain ſalaries iſſuing from lands veſted in truſtees for that purpoſe, and who were held not to have the power of procuring their names to be inſerted in the aſſeſſment upon appeal. p. 497. & ſeq.

The Cricklade committee reſolved, "That ſuch freeholders as were aſſeſſed for the premiſes in reſpect of which they claimed to vote, either in their own names, or in the names of their tenants actually occupying the ſame as tenants of ſuch freeholders, were entitled to vote at the late election for the borough of Cricklade." Under this reſolution, they ſtruck off the votes where the tenant was rightly named in the aſſeſſment, but the name of a different proprietor was inſerted. See p. 536.

The Buckinghamſhire committee reſolved, "That it is not neceſſary that the name of the owner ſhould appear upon the rate." No caſe occurred to afford an opportunity for the application of this rule. See 2 Lud. p. 539. In caſes where the voter was aſſeſſed as owner, the Bedfordſhire committee reſolved, "that the omiſſion or miſſtatement of the tenant's name in the aſſeſſment, ſhould not be deemed a valid objection to the owner's vote." 2 Lud. 514. The Cricklade committee reſolved alſo, that the voter ſhould be conſidered as duly aſſeſſed *primâ facie*, ſo as to require evidence to impeach the poll and aſſeſſment from the party objecting, in the caſes where the voter had given in one tenant, and was aſſeſſed in the name of another. 2 Lud. 515. The Buckinghamſhire committee, (p. 516.) reſolved, 1. that the party ſupporting the vote ſhould be put on proof of the freehold of the voter, where only the ſame occupier's name as is on the poll, appears on the rate. 2. That when the chriſtian name only of the voter is different in the rate, and poll, the party is not to be put on the proof.

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the ſurname being differently ſpelt, or ſometimes by the perſon himſelf being deſcribed not by his name, but by his office, ſituation, or ſome other character. 25th February. Where the voter on the poll was Joſeph Taten, and the proprietor on the aſſeſſment was Chas. Tatem, the committee determined "that where the chriſtian name of a voter varies on the poll and on the aſſeſſment books, the party who ſupports the validity of the vote ſhall be called on to juſtify ſuch variation[u]." In this caſe no ſuch evidence was given, and the vote was declared bad: in other caſes, the variation was juſtified, by calling the aſſeſſor, or collector of the land-tax, to declare that the voter was the perſon whom they had actually meant to aſſeſs, and that they had miſtaken his name: as in the caſe of Richard Goodwin, (6th and 7th March) who was aſſeſſed by the name of Wm. Goodwin: the aſſeſſor proved that his real name was Richard, and that Richard had been aſſeſſed, by a miſtake, in the name of William[w]. Where no chriſtian name, or the initials only appeared on the aſſeſſment, the party ſupporting the vote were called upon to ſupply the deficiency in ſuch aſſeſſment. This reſolution took place in the caſe of Hayman Dyſon (25th February); in the aſſeſſment, Suſan Dyſon, Ch. and H. Dyſon were rated as occupiers; and the aſſeſſor having proved that Hayman was meant by H. the vote was determined to be good. With regard to ſurnames, which varied on the poll and in the aſſeſſment, the committee gave their opinion upon each particular caſe, whether they ſhould be conſidered as different names, or the ſame name differently ſpelt, and taken down by the poll clerk according to his apprehenſion of it as it was pronounced to him by the voter. (Sometimes from the manner in which the name was

Different chriſtian name.

No chriſtian name, or initials only.

Surname miſ-ſpelt.

[u] In all caſes, ariſing from the aſſeſſments, the party ſupporting the vote was called upon to get rid of the objection.

[w] The Bedfordſhire committee ſeem to have proceeded by the ſame rules. See 2 Lud. p. 517. 520. 523. The Glouceſterſhire committee reſolved, "that where there is any doubt whether a particular eſtate is included as aſſeſſed under any particular article in the rate, the parties are at liberty to give evidence in explanation of the rates, to induce the committee to believe that it is included or otherwiſe in the aſſeſſment." And they admitted the aſſeſſor to give evidence of his intentions in making the rate, p. 57. and ſee p. 164.

written in the poll, or the aſſeſſment, it became difficult to ſay what letters were intended to be made uſe of). Many caſes of this ſort daily occurred, but a few inſtances will be ſufficient here; Colten was taken to ſtand for Coulton, the real name of the voter, or his occupier, and the name upon the aſſeſſment: Hoſkins for Hoſkinſon, Myers for Swires, Ridgeway for Ridgley, Tacker for Decka; it being proved, that there was no perſon of the name deſcribed on the poll, in the occupation of, or intereſted in the premiſes. See *ante*, p. 52. and p. 62.

25th February. John Williams. In the original aſſeſſment, "Rev. Mr. Williamſon." In one of the copies delivered out by the clerk of the peace, the ſame name appeared; in another, "Rev. Mr. Williams." By ſt. 20 G. 3. c. 17. ſ. 13. every copy ſo delivered out, is made evidence. The committee determined to abide by that in which the voter was rightly named [x]. It was alſo agreed that it was incumbent on the party who ſupported the vote, to call the aſſeſſor to prove that he meant to aſſeſs John Williams, by the name of the Rev. Mr. Williams.

30th June. Thomas Francis Jennings. In the aſſeſſment, Thomas Jennings. The committee required proof that the perſon named in the aſſeſſment was the voter. *Contrà* 2 Lud. 516.

The title of the voter to be ſhewn, where a different proprietor is aſſeſſed.

In the courſe of their proceeding, the committee found many caſes, where, although the eſtate voted for was in fact rated in the name of the tenant given in at the poll, ſome other perſon was aſſeſſed as the owner of it. This led them to ſuſpect that in ſeveral of them, frauds had been committed, by ſtrangers offering themſelves to vote for premiſes, to which they had no title. At length, they made a rule, that in ſuch caſes, the title of the voter ſhould be proved [y]. This rule was firſt adopted in the caſe of William

[x] See the determination 2 Lud. 527. where the copy given to the clerk of the peace, and the duplicate in the hands of the commiſſioners being equally authentic, the committee adopted that which ſupported the vote.

[y] It ſhould appear that this rule rather proceeded from the deſire of the committee to detect fraud in ſuſpicious caſes, or from their opinion, that without ſuch proof of the voter's title, the land aſſeſſed was not ſufficiently identified with

liam Biddulph, (7th March) who had voted for premiſes aſſeſſed in the name of the Coopers' company, as proprietors. The ſame point was three days afterwards again diſcuſſed in the caſe of Thomas Noble, who had named himſelf as the occupier of the freehold. The premiſes were aſſeſſed in his name as occupier, but in the name of another perſon as proprietor. The committee determined, that, as it appeared from the face of the aſſeſſment that another perſon was the proprietor, it was incumbent on thoſe who ſupported the vote, to contradict that preſumption, and to prove that the voter was the proprietor. No ſuch proof being given, the vote was declared bad.

Although the proprietor on the poll be ſhewn to have no title.

17th March. Robert Hill. Occupier, "Self." Aſſeſſed in the name of Lord Hinchinbroke, as proprietor, and of Robert Hill, as occupier. It was proved that Lord H. had parted with the premiſes in 1796, and that the voter had been in poſſeſſion ſince 1800. The objection of non-aſſeſſment was the only one relied upon by the petitioner, and the only one named by him againſt this voter, in the liſt delivered by order of the Houſe. The committee held it neceſſary for the party ſupporting the vote, to ſhew a freehold title in the voter, for 12 months before the election: although it was contended, in ſupport of the vote, that the preſumption ariſing from the inſertion of Lord H.'s name upon the poll, had been done away, and that the poſſeſſion of the voter ſhould be conſidered as *primâ facie* evidence of a freehold title. The vote was determined to be bad.

Voter's name conſiſtent with that of the owner aſſeſſed.

Where the name of the tenant being the ſame on the poll, and on the aſſeſſment, the name of the proprietor was not inconſiſtent with the name of the voter on the poll: as, A. B. the voter; aſſeſſed, "late C. D." or "Mr. B." &c. the committee required no evidence of the title, or of the identity of the proprietor.

Change of occupation between

In the caſe of William Stunnell, (19th March), the committee determined, "that when an occupier appears on the

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with the land voted for, than from the principle (mentioned *ante*, p. 47.) of taking notice of new objections diſcloſed by the evidence; for in general, the entries in the books of aſſeſſment were held not to be admiſſible as evidence in ſupport of any other objection, than that of non-aſſeſſment. N. B. In theſe caſes, the production of the voter's title-deeds was required. See *poſt*.

making the aſſeſſment and the election.

aſſeſſment of 1801, who is not the tenant given in at the poll, it is neceſſary to prove that ſuch perſon was actually the tenant at the time ſuch aſſeſſment was made." And on 9th April, they determined, "that the foregoing rule applied only to ſuch caſes, where no name appeared on the aſſeſſment of 1801 as proprietor, and where the name of the occupier on ſuch aſſeſſment differed from the name of the tenant on the poll." Where there was no proprietor aſſeſſed, and the occupier on the poll and on the aſſeſſment were the ſame, no further evidence was required. Where the name of the proprietor on the poll and on the aſſeſſment was the ſame, and the name of the tenant differed, no further evidence was required. Where no proprietor was aſſeſſed, and the occupier's chriſtian name was omitted, or put with initials only, evidence was required to ſhew that the chriſtian name of the occupier aſſeſſed, was the ſame with that of the occupier named on the poll; (ſee *ante*, p. 67.) but if the name was at full length on the aſſeſſment, and put with initials on the poll, no explanation was held neceary.

No proprietor aſſeſſed.

Voter aſſeſſed as proprietor, with a different tenant.

Occupier aſſeſſed without a chriſtian name, or by its initial letter.

Name of occupier on the poll.

Not aſſeſſed as deſcribed on the poll, in reſpect of the ſituation of the freehold.

Freehold deſcribed in one ſtreet; aſſeſſed in another.

29th February. James Knowles. Situation of the freehold on the poll, "Richmond Street." Aſſeſſed, "on the weſt ſide of the Bowl and Pin;" which is the deſcription of a row of houſes, near Richmond Street, and in the ſame pariſh. It was contended, that the freehold having been deſcribed to be in a place ſituate in the ſame pariſh, it was ſufficient: but the committee held the deſcription on the poll not to agree ſufficiently with the aſſeſſment, and determined the vote to be bad[x].

[x] The Bedfordſhire committee diſallowed the vote, where the freehold was deſcribed in one pariſh, and aſſeſſed in another. 2 Lud. 509. Where the voter deſcribed his freehold in Leigh, and it appeared that the name of the pariſh was Leigh and Cleverton; that the aſſeſſment was in two diviſions, and that the voter's freehold was aſſeſſed in Cleverton; the Cricklade committee held the vote to be good. 2 Lud. 512. But where the pariſh, conſiſting of four tithings, the voter deſcribed his freehold in one of them, and it appeared to be aſſeſſed in another, the vote was held bad. p. 512.

27th February. W. F. Green. Situation of freehold on the poll, "Edgware." Aſſeſſed in Hendon. The vote was declared bad. Different pariſh.

5th March. James Arding. Situation of freehold on the poll, "Gray's Inn Lane." Aſſeſſed in Chad's Row. Chad's Row is a continuation of Gray's Inn Lane, and is ſometimes called by the ſame name. The vote was allowed. A ſtreet called by both names.

—— March. Thomas Baxter. Situation of freehold, "Whitechapel Road." Aſſeſſed in Whitechapel High Street: the road is a continuation of the ſtreet, but it is numbered ſeparately, and never called by the ſame name. The committee declared the vote to be bad. Different ſtreet.

20th March. Laurence Colſon. Situation of freehold, "Chandos Street." Aſſeſſed, in Ship Yard. There are only three houſes in this yard, which goes out of Chandos Street. They are ſeldom called by the name of Ship Yard, but generally Chandos Street. The vote was allowed. Called by both names.

18th April. John Roberts. Situation of freehold, "Harrow." Aſſeſſed in Pinner, which is a hamlet of the pariſh of Harrow, but maintains its own poor ſeparately, has a ſeparate ballot for the militia, ſeparate churchwardens, and a ſeparate land-tax aſſeſſment. The committee declared the vote to be bad. Deſcribed in the pariſh; aſſeſſed in a hamlet of the pariſh.

18th April. Thomas Seager. Situation of freehold on the poll, "Harrow." Aſſeſſed in Kenton: which is a diviſion of the pariſh of Harrow, but did not appear, by the evidence given, to be diſtinguiſhed from the pariſh in general, in any of the particulars mentioned in the laſt caſe. The committee determined the vote to be good[y]. Deſcribed in the pariſh; aſſeſſed in a particular diviſion.

Not aſſeſſed as deſcribed on the poll, in reſpect of the nature of the freehold.

19th March. Thomas Lucas. Nature of the freehold on the poll, "Ground." Aſſeſſed for a houſe. The committee diſallowed the vote.

[y] The Cricklade committee determined, "that the voter's being rated on the aſſeſſment of ſome or one of the tithings, part of the mother pariſh of Highworth, was ſufficient:" he having deſcribed his freehold to be ſituated in the mother pariſh. 2 Lud. 511.

Vote for an office—aſſeſſment for a houſe belonging to it.

19th April. William Ramſden. Nature of freehold on the poll, "Maſter of the Charter-houſe." He was not aſſeſſed for his office, but for a houſe which he held by virtue of his office; and he had redeemed the land-tax in reſpect of that houſe, ſome time before the election. The contract of redemption, being put in, appeared to be for an houſe. The appointment of the voter to his office was proved. It was contended, that the vote was bad, becauſe the office, in right of which he voted, had never been aſſeſſed; and that the aſſeſſment for the premiſes, which he held by virtue of his office, and the redemption of the land-tax in reſpect thereof, would not avail him[z], ſince it was not for thoſe premiſes, but for the office itſelf, that he had voted. To this argument it was anſwered, firſt, that it was not neceſſary that he ſhould be aſſeſſed for his office; and it was ſaid that this had been decided in the caſe of Nathaniel Berry[a]. But the chairman remarked, that the committee had in that caſe laid down no ſuch rule; but had only preſcribed the mode of proceeding in caſes, where the office was admitted by the counſel on each ſide, to be of ſuch a nature as not to require aſſeſſment. And the counſel on the other ſide in reply, adverted to the caſe of an exigenter, who had voted in right of his office, and to whom the objection was made, that he had not been aſſeſſed in reſpect of it: which was anſwered, by ſhewing the aſſeſſment. The committee, after ſome deliberation, determined, "that W. Ramſden, having deſcribed himſelf as maſter of the Charter-houſe on the poll, and it being ſhewn that the land-tax of his houſe was redeemed, is a good vote." The counſel who objected to the vote, requeſted of the chairman to be informed, whether the committee had made this deciſion, upon the ground that it was not neceſſary that the office ſhould be aſſeſſed: to which the chairman anſwered in the negative, and intimated the opinion of the committee to be, that the voter, having deſcribed himſelf maſter of the Charter-houſe, was entitled to vote for his houſe, which

[z] See *poſt*, exemption from aſſeſſment in the caſe of land-tax redeemed.

[a] See *poſt*, exemption from aſſeſſment, in the caſe of offices.

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he poſſeſſed as ſuch maſter, and the land-tax for which had been redeemed.

Nature of freehold not diſtinguiſhed in the aſſeſſment.

30th June. Richard Friday. He voted for land in his own occupation. The aſſeſſment did not diſtinguiſh what the nature of the property was; as, whether it conſiſted of a houſe, or land, &c. The aſſeſſor was aſked, whether it was not an houſe; but the committee would not permit the queſtion to be put to him; and the chairman ſaid, that the aſſeſſors had only been allowed to explain the aſſeſſment, in caſes where the entry thereon was ambiguous, or where it appeared to be inconſiſtent with the account given by the voter: here, there was no inconſiſtency or ambiguity [b], the nature of the freehold being wholly omitted in the aſſeſſment. The vote was determined to be good.

2. Not duly aſſeſſed.

Mere payment of the land-tax, not ſufficient.

The committee, as has been already obſerved, held an aſſeſſment in the name either of the owner, or of the tenant, to be neceſſary. In the caſe of James Dell, (27th February) no aſſeſſment either of the voter or tenant was found. It was propoſed to prove the freehold aſſeſſed, by putting in the receipts given to the tenant of the land, who had actually paid the rate; and it was contended that this was a virtual rating; and that a virtual rating was ſufficient: but the committee decided, that this was not ſufficient evidence to eſtabliſh the aſſeſſment.

Not duly aſſeſſed in the name of the owner [c].

Virtual rating inſufficient.

27th February. Richard Pepley. In the aſſeſſment, "late Goſport" was inſerted in the column of proprietors: no tenant's name appeared. The committee determined the vote to be bad [d].

27th

[b] See ante, p. 67.

[c] It will be recollected, according to the general rules laid down *ante*, p. 70. that in this claſs of caſes, no occupier, or a wrong occupier, was aſſeſſed.

[d] So the aſſeſſment of land in the name of "Tyſon's heirs," was held inſufficient. See *poſt*. vote of David Jennings, under the head of exemptions from aſſeſſment in the caſe of rent charges, &c. The Bedfordſhire committee held an aſſeſſment to be bad, in the name (as proprietor) of "Billington Town land:" "heirs of Thomas Foſkey;

S. P. owner rated under the word "Co."

27th February. Charles Blackwell. Occupier on th "ſelf." The freehold was aſſeſſed in the names of " Boddimead and Co.," as proprietors. The aſſeſſor dec that under the word " Co." he underſtood the voter compriſed, whom he conſidered to be the partner of Boddimead. The counſel againſt the vote objected, the intention of the aſſeſſor being admitted as evider explain the aſſeſſment: 2. to any explanatory eviden ing given of the word " Co.," ſince, as they contend could only amount to a deſcription of the owner, w it was required that he ſhould be aſſeſſed by his name committee decided the vote to be bad. See p. 78.

Proprietor of a ſhare of the New River.

1ſt March. George Marſhall. He voted for a ſh the New River. The aſſeſſment was in the name of proprietors of the New River." The committee deter that the aſſeſſment of the company was a good aſſeſſme the ſhares. It is to be obſerved, that by ſtatute, a pa lar mode is provided for paying the land-tax aſſeſſed o property, from the general fund.

Deſcription of the owner as vicar of S. ſufficient.

2d July. Rev. W. Aubrey Phelp. In the aſſeſſ "the vicar of Stanwell" was named as proprietor

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Foſkey; " Dunſtable charity; late Franklin's." But they allowed the vote, where the entry was, " late White's, *in diſpute.*" 2 Lud. p. 521. The Glouceſterſhire committee held, that by ſt. 18 G. 2. a perſon who had purchaſed, 12 months before the election, a freehold eſtate of the value of 40s. *per ann.* at the time of the purchaſe, for which he did not appear particularly rated to the land-tax, but to have been included in a general aſſeſſment impoſed on the vendor (compriſing other land), was entitled to vote, p. 55. But (p. 89) they held that a perſon had no right to vote, who had purchaſed an eſtate in land of the annual value of 20s. at the time of ſuch purchaſe, on which he had ſince erected a meſſuage of the annual value of 6l. which land, at the time of the purchaſe, was included as rate eſtate of the ſeller, who conti pay the ſame rate as before the tion, but no additional aſſeſſm poſed on the eſtate for the e value by building the ſaid me The reader will however bear i both with reſpect to theſe, and caſes cited, upon the ſubject o ment, from the Glouceſterſhi that the law which then prevaile from the ſt. 18 G. 2. c. 18. which the freehold to be rated, but no name either of the owner, or his In one caſe, they reſolved, that the tenant's name appeared on t for land, " late Hollifter's," it cumbent upon the party ſuppo vote, to prove, that it was t land for which the voter had p. 26.

free

freehold; which was conſidered as a ſufficient aſſeſſment in the name of the proprietor; the voter being proved to be the vicar.

— March. Francis Ireland. In the occupier's column, the name F. Ireland was found, with the letters "Ld" added. The aſſeſſor depoſed, that "Ld" ſtood for landlord; and that theſe letters had been inſerted before the allowance of the aſſeſſment. The vote was determined to be good. Owner's name in the tenant's column, and ſtated there to be landlord.

21ſt April. John Cotchet. In the aſſeſſment, no proprietor's name appeared in the proper column; but the voter's name was inſerted in the column of occupiers. The premiſes were in fact occupied by another; but the aſſeſſor had named the voter only, becauſe he had always received the land-tax from him. The committee held the vote to be bad. Owner aſſeſſed as occupier.

19th March. Edward Fawill. Occupier on the poll, "Joſeph Cox." Occupier aſſeſſed, "Edward Fawill." The aſſeſſor ſaid, that Fawill always paid the rate, and that Cox was Fawill's ſervant. It was obſerved, againſt the vote, that if Fawill was the occupier he ſhould have deſcribed himſelf as ſuch on the poll; if Cox was the occupier, he ſhould have been aſſeſſed as ſuch. The vote was declared bad. Same point.

19th March. William Kirkby voted for chambers in Staples Inn, which he held for life of the ſociety of that Inn. The ſociety were aſſeſſed as proprietors, and the voter as the occupier. The voter did not occupy the chambers himſelf; but it appeared, from the evidence of the aſſeſſor, that throughout the whole of the aſſeſſment for this Inn the ſociety were named as the proprietors, and thoſe who held chambers under them, whether for life, or otherwiſe, were named as occupiers. In ſupport of the vote, the caſe of Francis Ireland was referred to, and it was further contended, that here, in fact, both the parties named in the aſſeſſment might be conſidered as being rated as proprietors; *viz.* the one of the legal, the other, of the equitable eſtate: or, the one, as owners of the fee; the other, of a life intereſt; and that the committee would not conſider themſelves bound by the form of the aſſeſſment, in this caſe, where the practice Same point.

tice had been explained. But the committee held the aſſeſſment to be inſufficient; and they diſtinguiſhed this caſe from that of Ireland, by obſerving, that the explanation there, appeared upon the face of the aſſeſſment itſelf; whereas here, nothing appeared, except from the evidence of the aſſeſſor, to ſhew that the voter was not aſſeſſed as occupier: and they determined the vote to be bad.

Aſſeſſment of the voter's wife, by her maiden name.

29th February. James Luced. In the aſſeſſment, "Mary Murray" was aſſeſſed as proprietor. Mary Murray had married the voter about five years before the election, and had deſired that the aſſeſſment of theſe premiſes (of which ſhe had been the owner) might continue in her name. The committee determined, "that the name of the wife ſhould not be conſidered as ſufficient on the aſſeſſment either as landlord or tenant, but the name of the huſband ſhall be required, in any caſe, where the parties have been married more than 12 months previous to the election." The vote was declared bad.

Aſſeſſment in the name of the wife, bad.

5th March. Richard Edwards. The proprietor aſſeſſed was "Ann Edwards." The collector ſaid, that Ann Edwards was the wife of the voter, and that her name had been inſerted by a miſtake, inſtead of his. Upon the authority of the preceding caſe, this vote was alſo determined to be bad.

Aſſeſſment in the name of the voter's joint-tenant, bad.

31ſt May. John Rogers. He was one of two joint-tenants of the freehold. In the aſſeſſment, the other was aſſeſſed as the proprietor of the eſtate for which J. R. voted. His vote was diſallowed [e]. See the vote of Thomas Dickſon, *poſt*. p. 78.

Not duly aſſeſſed in the name of the tenant [f].

Change of tenant between the aſſeſſment and the election.

27th Feb. William Maſon. Occupier on the poll, "—— Ginn." In the aſſeſſment one Denton was named as the occupier. The aſſeſſor proved that Denton was the

[e] See a ſimilar determination, 2 Lud. 508.

[f] The reader will recollect that theſe queſtions aroſe, in thoſe caſes, where no proprietor was aſſeſſed, or where another perſon, and not the voter, was aſſeſſed as proprietor: and that in the latter caſe, it was alſo neceſſary for the party ſupporting the vote to prove the voter's title.

occupier when the aſſeſſment was made, and that Ginn ſucceeded him, and was tenant at the time of the election. The vote was allowed.

Change of tenant between the making, and the allowance of the rate.

——March. Richard Smedley. Occupier on the poll, "James Dukes." Occupier aſſeſſed, "Elizabeth Young." the aſſeſſment was allowed, 7th Oct. 1801. E. Young, who was tenant when the aſſeſſment was made, left the premiſes, 29th September 1801, and they were in fact empty when the rate was allowed. Afterwards the tenant named on the poll entered, and occupied the premiſes at the time of the election. The committee determined the vote to be good [g].

Inſufficient evidence of a change of tenancy.

19th March. William Twentyman. Occupier on the poll, "ſelf." Occupier aſſeſſed, "Mary Wall." The aſſeſſor ſaid he believed that the voter had taken poſſeſſion of the premiſes before the election; but he not being able to ſpeak poſitively to that fact, and the name of Mary Wall continuing as occupier in the aſſeſſment of 1802, the committee determined the vote to be bad.

Premiſes empty at the time of making the aſſeſſment.

2d March. William Wilcox. Occupier on the poll, "Martin Wade." In the column of occupiers on the aſſeſſment, "E." was inſerted, for "empty," and no proprietor. It was proved that the houſe was empty, when the aſſeſſment in 1801 was made; and that Wade entered at Chriſtmas 1801, and continued to be tenant at the time of the election. It was attempted to ſupport this vote upon the principle, upon which the caſe of William Maſon [h] had been decided, *viz.* a change of tenancy; or rather, of circumſtance; the fact being truly ſtated in the aſſeſſment. But the committee held the aſſeſſment to be inſufficient, and the vote to be bad; conſidering the premiſes not to be aſſeſſed at all.

Aſſeſſment of a former occupier.

19th March. Robert White. Occupier on the poll, "James White." In the aſſeſſments 1801 and 1802, proprietor, "Duke of Portland;" occupier, "Robert White."

[g] The entries on the aſſeſſment were held to refer back to the 25th March, at whatever time the rate had in fact been made, or allowed.

[h] *Supra*, p. 76.

It

It was proved by the oath of James White, the voter's brother, that he (the witneſs) had occupied the houſe for eight years: that before that time the voter had occupied it, and that by inadvertence, the voter's name had continued in the aſſeſſment as occupier. It appearing therefore in this caſe, not that the aſſeſſor had miſtaken the name of the preſent tenant, but that he had continued the name of a former tenant, the vote was declared bad.

Tenant aſſeſſed as "A. B. and Co."

— March. John Gibſon. Occupier on the poll, "John Gibſon." Occupiers aſſeſſed, "Prior and Co." A witneſs proved that John Gibſon was one of the partners. But the committee held the aſſeſſment to be inſufficient, and the vote to be bad. See *ſup.* p. 74.

Occupiers aſſeſſed under the name of "Sharpe's tenants."

24th April. William Sharpe. Occupiers on the poll, "Inmates." Occupiers aſſeſſed, "Sharpe's tenants." It was propoſed to ſhew that this was in fact an aſſeſſment of Sharpe himſelf as the occupier; his tenants being weekly lodgers. The collector, however, ſaid that he did not mean to rate Sharpe as the occupier, but thoſe who held under him. In ſupport of the vote, a caſe was cited, 7th March, where the committee had held an aſſeſſment on "Holden for tenants," a ſufficient aſſeſſment on Holden, as occupier; and the deciſion of the committee was referred to in p. 60. *ante*, in which they held that a man was not bound to give in his weekly lodgers as occupiers, but that he might, in that caſe, ſtate the premiſes to be in his own occupation. But the chairman obſerved, that the deciſion referred to, applied only to the deſcription of the occupier on the poll: here, the objection was againſt the aſſeſſment; for it plainly appeared that Sharpe was not aſſeſſed as occupier, but that other perſons were aſſeſſed, who were not named. The vote was determined to be bad.

Aſſeſſment in the name of a joint-tenant as occupier, bad.

7th June. Thomas Dickſon voted for a houſe in his own occupation. The freehold was aſſeſſed in the name of George Dickſon as occupier. It was proved that the two brothers occupied the premiſes jointly, at the time of the election, and of the aſſeſſment; and that they were jointly intereſted in the eſtate. The vote was declared bad. See the vote of John Rogers, *ante*, p. 76.

29th

29th June. Joſeph Hurlock. Occupiers on the poll, "the Moravian Society." Occupier aſſeſſed, "John Lewis Wollin, for chapel and burying ground." The Moravian Society are no corporation, but a religious ſect. It was proved that the premiſes in queſtion were made uſe of by them for religious purpoſes: and were under the care of one Curtis, the ſervant of the ſociety, who reſided there. Mr. Wollin was a member of the ſociety. It was inſiſted, that this was not a ſufficient aſſeſſment of the premiſes in the name of the tenant: if the occupier *de facto* were looked to, Curtis ſhould have been named as occupier; if the legal occupation, or tenancy, the ſociety ſhould have been named, and not Mr. Wollin, who was only an individual member of the ſociety, and had no private, or ſeveral intereſt in the premiſes. In defence of the vote it was ſaid that the ground being taken by a ſociety of many perſons, any one of them might be ſaid to be an occupier; that if the name of one was not ſufficient, it would be neceſſary to inſert the names of the whole number, ſince they had no corporate name; but that this had never been required, either in the caſe of proprietors, or of occupiers. The committee decided the vote to be bad.

Ground occupied by the Moravian Society, aſſeſſed in the name of one of their members.

Not duly aſſeſſed, from ſome irregularity in the form, &c. of the aſſeſſment[1].

2d March. Edward Greenhill. It appeared that the books of the aſſeſſment for the liberty of the Rolls, and extra-parochial parts of Lincoln's Inn (in which the voter's freehold was ſituate) had been very irregularly kept. The ſame book had been made to ſerve for two or three years, by making alterations in the names, &c. with red ink, and by procuring a freſh ſignature from the commiſſioners, the page being torn off, upon which the ſignature for the year preceding had been made. Conſequently, no ſignature appeared for the rate of the year 1801. The rate for the year

[1] For the form of the aſſeſſment the reader is referred to ſtats. 20 G. 3. c. 17. 38 G. 3. c. 5. 38 G. 3. c. 60. by which the land-tax was made perpetual.

1802,

1802, was ſigned and ſealed by two commiſſioners only[k]: nor had any duplicate of that aſſeſſment been returned to the clerk of the peace[l]. But the collector having depoſed that in fact the rate had been made, allowed, and collected for the year 1801, the committee determined, that as the books of aſſeſſment produced had been acted on as valid and were the only evidence of aſſeſſment, they ſhould be received in evidence.

Rate in 1801 collected by the aſſeſſment of 1800.

23d June. Timothy Tirrell voted for chambers in Lyon's Inn. To prove the aſſeſſment, the collector produced a paper purporting to be an aſſeſſment for 1800, by which the witneſs ſaid he had collected the land-tax, not only for that year, but for the years 1801, 1802, and 1803: and that no other had been made. It was objected, that this paper could not be received in evidence as an aſſeſſment for 1801: but the committee determined, "that as the paper produced has been acted upon as the aſſeſſment of 1801, and is the only evidence of aſſeſſment in that year, it ſhall be received in evidence." The vote was determined to be good.

Aſſeſſments out of the county received, where the boundary was diſputed.

9th May. Thomas Lamb. He voted for premiſes in Furnival's Inn court, which ſtand upon a diſputed boundary between the county of Middleſex, and the city of London but are aſſeſſed in the latter. The committee were of opinion, that in favour of the franchiſe, they might be conſidered to be within the county, unleſs the contrary were proved: upon which it was objected, that the London aſſeſſments could not be received in evidence of the premiſes being duly aſſeſſed: but the committee reſolved to receive the evidence, and determined the vote to be good.

Name inſerted by the collector af-

28th March. Charles Mann voted for land in Uxbridge in his own occupation. It appeared, that in the aſſeſſmen

[k] The ſt. 38 G. 3. c. 5. ſ. 8. requires that each of the three duplicates of the aſſeſſment ſhall be ſigned and ſealed by three or more commiſſioners. Where it appeared that the cuſtom had been for the clerk to make out the copies, and deliver them out without the ſignature of the commiſſioners, th Glouceſterſhire committee received duplicate, without ſuch ſignature, i evidence. p. 180.

[l] As it is required by ſt. 20 G. 3. c 17. ſ. 3.

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for 1801 the name of Mr. Naylor appeared as occupier; but that after the ſigning of the aſſeſſment by the commiſſioners the name of Mr. Mann was inſerted by the collector, and that the land-tax for the year 1801 had alſo been paid by Mr. Mann. Mr. M. had purchaſed the premiſes in 1801, and was regularly aſſeſſed for them in 1802. The committee determined the vote to be bad. ter the allowance by the commiſſioners.

3. Of exemptions from aſſeſſment; in the caſe of rent-charges, and fee-farm rents.

The general enactment of the ſtat. 10 Ann. c. 23. ſ. 2. has already been ſtated, p. 63. By ſtat. 12 Ann. c. 5. it was declared, that the former act ſhould not be conſtrued "to reſtrain any perſon from voting for a knight of the ſhire in reſpect or in right of any *rents*, tithes, or other incorporeal inheritances, or any meſſuages or lands in extra-parochial places, or any chambers in the inns of court, or inns of chancery, or any meſſuages or ſeats belonging to any offices, in regard or by reaſon that the ſame have not uſually been, or ſhall not be charged or aſſeſſed to all or any the public taxes, church rates, and pariſh duties, as mentioned in the above recited act," (10 Ann.) Statutes.

By ſtat. 18 G. 2. c. 18. the clauſe 10 Ann. c. 23. ſ. 2. was repealed, and it was enacted, that no perſon ſhould vote in right of any "meſſuages, lands, or tenements," which had not been aſſeſſed to the land-tax a year before the election: by ſ. 4. an exemption was made of perſons voting "in reſpect or in right of any *rents*," or any chambers in the inns of court, or inns of chancery, or any meſſuages or ſeats belonging to any offices, &c. The ſtatute 3 G. 3. c. 24. prohibits any perſon from voting "for or in reſpect of any *annuity* or *rent-charge*," unleſs it ſhall have been entered with the clerk of the peace at leaſt 12 calendar months before the firſt day of the election. By ſtat. 20 G. 3. c. 17. which fixes the time of aſſeſſment to ſix calendar months next before ſuch election, it is provided (ſ. 2.) that this act ſhall not extend, "to *annuities* or *fee-farm rents* (duly regiſtered) iſſuing out of any meſſuages, lands, or tenements, rated or aſſeſſed as aforeſaid." St. 3 G. 3. c. 24.

38 G. 3. c. 5.

By ſtat. 38 G. 3. c. 5. ſ. 5. where lands, &c. are encumbered with rent-charges, annuities, fee-farm rents, rent-ſervices, or other rents, thereupon reſerved or charged, above 20s. *per annum*, the owner of the land, &c. may deduct therefrom a proportionable part of the land-tax. And by ſ. 24. it is enacted, "that all fee-farm rents, and all other rents, payments, ſum and ſums of money, and annuities, iſſuing out of or payable for any lands, ſhall be liable towards the payment of every ſum by this act to be taxed and levied: and all ſuch tenants are hereby directed and authorized to pay them proportionably, according to the rates and aſſeſſments by this act directed and appointed," &c.

The regiſtration of a rent-charge, and the aſſeſſment of the lands, muſt be proved by the party ſupporting the vote.

5th March. Charles Abbott. In this caſe, the committee determined, that when a voter is objected to, upon the ground of non-aſſeſſment to the land-tax, and an exemption from ſuch aſſeſſment is claimed on the ſcore of rent-charge, the party maintaining the vote ſhall be called upon to prove that the rent-charge is duly regiſtered, and that the eſtate from which it iſſues is duly rated and aſſeſſed. Under this rule, the vote of Mr. Dudley North, who had voted for a rent-charge, which was proved to have been regiſtered, was ſet aſide, as it did not appear that the lands from which it iſſued were aſſeſſed.

Fee-farm rents muſt be regiſtered, or aſſeſſed.

24th May. David Jennings, voted for a fee-farm rent iſſuing out of the manor of Hackney, payable by the Lord of that manor. It was objected againſt him, 1. that his freehold was not duly aſſeſſed; 2. that it was not duly regiſtered. On the aſſeſſment, "Tyſon's heirs" were named, as the proprietors of the manor and no occupier; the name of the occupiers of the reſpective lands were placed in their proper column. The manor was at the time of the election, and long before, veſted in truſtees, for Mr. Tyſon. The voter had filled up the column of occupiers on the poll, with the name of "Mr. Tyſon." His title to the fee-farm rent, and his poſſeſſion of it, were fully proved; but there was no proof that it had been regiſtered; and it was ſcarcely contended, that the aſſeſſment in the name of "Tyſon's heirs," of the eſtate from which it iſſued, could be conſidered as ſufficient, ſince the committee had in many caſes,

held

held ſimilar deſcriptions to be bad [m]. But it was contended in ſupport of the vote, that it was neither neceſſary that the rent ſhould be regiſtered, nor that the land from which it iſſued ſhould be aſſeſſed, for the following reaſons:

The ſtatute 3 G. 3. c. 24. ſ. 3. mentions "annuities and rent-charges;" the ſt. 20 G. 3. c. 17. ſ. 2. has the words "annuities and fee-farm rents [n];" but it is probable, that the latter word was put in by a miſtake, inſtead of the word "rent-charges," ſince it is clear that this act meant to embrace the ſame objects as the former. Fee-farm rents are not within the ſpirit of either ſtatute: The object of both is (as appears from the preamble of ſt. 3 G. 3.) to prevent fraudulent qualifications: but it is almoſt impoſſible, that a fee-farm rent, from the nature of it, can be made the ſubject of a fraudulent qualification, for it is a rent reſerved to the grantor, at the time that the eſtate itſelf is granted out; whereas a rent-charge is granted out of the eſtate. A fee-farm rent cannot be diſtrained for, unleſs a ſpecial power of diſtreſs be reſerved or granted: whereas a power of diſtreſs is incident to every rent-charge. See Bradbury v. Wright, Douglas's Rep. in K. B. 627. If the ſt. 20 G. 3. c. 17. be held to apply to fee-farm rents, rent-charges muſt be conſidered not to fall within it; for they are not named there. Fee-farm rents neither are, nor can be, regiſtered, according to the proviſions of the ſt. 3 G. 3. for by the 3d ſection of the act, the memorial is required to be "under the hand and ſeal of the *grantor* or *grantors*, and atteſted by two witneſſes, one whereof to be one of the witneſſes to the execution of ſuch grant;" whereas no one can with propriety be called the *grantor* of a fee-farm rent; ſince, as it has already been obſerved, ſuch a rent is not granted, but reſerved [o].

On the other hand it was contended, that by the general proviſions of the ſtatute, every freehold muſt be aſſeſſed: the exception is made in favour of certain freeholds, which are regiſtered in the manner preſcribed. Therefore, if this

[m] See *ante*, p. 73.
[n] See *ſupra*.
[o] See 2 Lud. 504. and ſee Bulpit v. Clarke, 1 Boſ. and Pull. (New Reports) 60. Com. Dig. Rent. C. 9. Pleader, 3 K. 18.

property be not conſidered as a rent-charge, which m regiſtered, it falls under the general deſcription of a ment, which ſhould be aſſeſſed. In either view of th the vote is bad; and in the former, it is liable to the tional objection, of the land from which the rent iſſu being aſſeſſed. The words of the ſt. 20 G. 3. c. 17. a preſs, and afford a deciſive anſwer to all the diſtin made on the other ſide; ſtrictly confining the exempt annuities, and fee-farm rents, duly regiſtered; which admit but of one conſtruction. With reſpect to the tion ariſing from the form of regiſtration preſcribed l act, the perſon to whom the land is granted may wi ficient propriety be ſaid to be the grantor, ſince bound to pay the rent. The committee decided the v be bad [p].

[p] The following are the caſes relative to the preſent ſubject, that are to be met with in other books. Glouceſterſhire, p. 58. John Smith. "Objection, reſerved rent not regiſtered, As neither reſerved nor fee-farm rents are mentioned in the act for regiſtering annuities, the committee reſolved, *nem. con.* that a reſerved or fee-farm rent need not be regiſtered under the act for regiſtering annuities: and ſee p. 106. *ib.* In the caſe of the Rev. John Jones, p. 41, who is ſaid to have voted for a payment of 20l. a year, in lieu of tithes, the committee negatived the motion, that he "ſtanding on the poll as voting for a ſalary iſſuing out of the great tithes, is obliged to regiſter the ſame under the act for regiſtering annuities, or rent-charges." P. 127. Samuel Harrington. "One Merryman pays from his eſtate a fee-farm rent of 5*l. per ann.* to the voter; it formerly was paid to Dee. Dee bequeathed it to the voter. It was contended, that an annuity coming to the voter by will, and not by grant, does not require to be regiſtered, as a right cannot be taken away in an act of parliament, but by expreſs words. The committee reſolved, "annuity for which S. H. vo which devolved to him in 176 will of John Dee, does not r be regiſtered." In the caſe Turner, (Bedfordſh. 2 Lud. was held that the vote of a ſch for a rent-charge, iſſuing out ſettled upon the rector of th (by whom the appointment of had been made) was good, al had neither been aſſeſſed, nor re the benefice itſelf being duly The reader will remember Glouceſterſhire committee ſa the 20 G. 3. (in 1777); the ſhire after, (in 1785). See 71. 1 Heyw. 153, 154, 155. 500. 504, 505.

And where the vicar received of 10*l.* a-year from the impro the great tithes, the committe his vote, although he was no for the ſtipend; the impropria aſſeſſed for the tithes: for it that there was no means b the vicar could get his name in the rate. 2 Lud. 508. p. 506.

It is not quite clear from this deciſion, whether the committee were of opinion that a fee-farm rent ſhould be aſſeſſed, or regiſtered, or that it was only neceſſary that the land from which it iſſued ſhould be aſſeſſed, and that in this caſe, the land was not aſſeſſed; for it is probable, that under their former deciſions, "Tyſon's heirs" would not have been conſidered as a ſufficient deſcription of the proprietor. But in the caſe of John Lee Bennet, (2d July) who voted for a fee-farm rent iſſuing out of land of Sir W. Gibbons, which land was duly aſſeſſed in the name of Sir W. G. as the proprietor, the rent itſelf being neither aſſeſſed nor regiſtered, the committee determined the vote to be bad, and declared their opinion to be, that the word fee-farm rent had been uſed in the ſt. 20 G. 3. by miſtake; but that the enactment of the ſtatute was ſo poſitive, that they felt themſelves bound by it; and that as the law now ſtands, either the freehold itſelf for which the vote is given, muſt be aſſeſſed; or it muſt be regiſtered, in the ſhape of an annuity or rent-charge; the land out of which it iſſues being likewiſe aſſeſſed.

Fee-farm rent muſt be regiſtered, if not aſſeſſed.

Of exemptions from aſſeſſment; in the caſe of land-tax redeemed or purchaſed.

By ſt. 38 G. 3. c. 60. the land-tax was made perpetual. By the ſame ſtatute, proviſions were alſo made for the redemption of it either by the poſſeſſors of the land charged, or the purchaſe by others. Several other acts were afterwards paſſed for the purpoſe of altering or explaining thoſe proviſions. They were finally conſolidated by ſt. 42 G. 3. c. 116. and by ſ. 200. of that ſtatute it is enacted, that perſons claiming to vote for premiſes, the land-tax whereon has been redeemed, &c. ſhall be entitled to vote, "without being compelled to ſhew that ſuch meſſuages, lands, or tenements, have been aſſeſſed to the land-tax, upon proving to the ſatisfaction of the returning officer, on oath, or otherwiſe, that ſuch land-tax hath at any time previouſly to ſuch election been redeemed or purchaſed, and the ſaid meſſuages, lands, or tenements, become exonerated therefrom."

Statutes.

Name of the purchaſer differing from that of the voter.

The queſtions that aroſe during the trial, relative to this ſubject, were chiefly upon the proof of the identity of the premiſes exonerated, and thoſe voted for: and where upon the contract of redemption being produced, the name of the purchaſer appeared to be different from that of the voter on the poll, the committee required proof of the title of the voter to the freehold; but it was held, that the variance of the tenant on the poll, and the occupier deſcribed on the

28 April. contract, was immaterial: provided the identity of the premiſes were ſufficiently proved. The committee in theſe deciſions, did not proceed upon any reference to the aſſeſſment act, but upon the principle, that in the former caſe, the party defending, by his own evidence, had raiſed a ſuſpicion againſt the voter. See *ante*, p. 68. *in not.*

Inſufficient proof of identity of the premiſes.

13th March. Chriſtopher Ridſdale. Occupier on the poll, "Chriſtopher Ridſdale;" freehold, "a houſe, ſituate in Patrick Square." The freehold had been laſt aſſeſſed in the name of Sarah Ridſdale, as occupier. A certificate of a contract of redemption was produced, by Chriſtopher Ridſdale, of a houſe in Patrick Square, in the occupation of Nathan Coward: and no other evidence was produced, to ſhew that this was the houſe voted for. The committee held this to be inſufficient proof of the identity of the premiſes.

Aſſeſſment of a different proprietor recited by the contract.

29th March. George Parkinſon. Occupier on the poll, "—— Malim." From the contract of redemption, made in 1799, by the voter, by a claim of preference, it appeared that the lands had been aſſeſſed in 1798, in the name of William Young, as proprietor, and of Wentworth Malim, as occupier. A conveyance was ſhewn from Lord Tyrconnell and others to the voter in fee; but no title was derived from William Young, whoſe name appeared upon the aſſeſſment recited in the contract. The committee in this caſe, thinking it neceſſary, with reſpect to the identity of the premiſes, that the inſertion of the name of Young ſhould be explained, (although there was no other evidence that Young had any intereſt in the premiſes) determined the vote to be bad. In the caſe of Edward Aldridge, 29th April, whoſe land-tax had been redeemed by Joſeph Aldridge, the aſſeſſment recited

cited in the contract was in the name of Deborah Aldridge: poſitive evidence was given, in ſupport of the vote, that D. A. never had any intereſt in the premiſes; and the title of the voter being proved by a conveyance from one Knight, the committee allowed the vote. And in the caſe of John Atkinſon, 28th May, where the contract of redemption was for premiſes "belonging to John Atkinſon, aſſeſſed in the name of Richard Atkinſon," and it was contended that a title from R. A. to the voter ſhould be proved, it was argued, that ſince the ſt. 42 G. 3. c. 116. ſ. 200, there was no neceſſity of ſhewing any connexion between the voter on the poll, and the proprietor named in the aſſeſſment, that ſtatute having entirely diſpenſed with the proof of aſſeſſment. The committee held the vote to be good [q].

Of exemptions from aſſeſſment; in the caſe of offices.

See ante, p. 81. St. 10 Ann. c. 23. 12 Ann. c. 5. 18 G. 2. c. 18. and ſt. 20 G. 3. c. 17; the laſt exempts not only annuities or fee-farm rents (duly regiſtered) iſſuing from lands aſſeſſed; but alſo freeholds which have devolved upon the voter "by deſcent, marriage, marriage ſettlement, deviſe, or promotion to any benefice in a church, or by promotion to an office, within 12 calendar months next before ſuch election;" where the predeceſſor has been rated within 2 years. And ſee ſt. 30 G. 3. c. 35 [r]. *poſt*, p. 89.

The following determinations took place relative to the ſubject of the aſſeſſment of offices.

[q] By ſtat. 42 G. 3. c. 116. ſ. 165. every copy of the regiſter of any contract made in purſuance of this act, and regiſtered according to the directions thereof with the proper officer appointed for that purpoſe, which ſhall be ſigned by him, ſhall be allowed in all courts and places, and before all perſons, to be good and ſufficient evidence of ſuch contract.

[r] See alſo ſtat. 38 G. 3. c. 5. (the land-tax act), ſ. 25. by which it is enacted that the ſtatute ſhall not extend to charge "any maſter, fellow, ſcholar, or exhibitioner of any college halls or hoſpitals mentioned therein; or any maſters or uſhers of any ſchools in England, Wales, or Berwick-upon-Tweed, for or in reſpect of any ſtipend, wages, rents, profits, or exhibitions whatſoever, ariſing or growing due to them, in reſpect of the ſaid ſeveral places or employments in the ſaid univerſities, colleges, or ſchools." No queſtion reſpecting exemptions by virtue of this clauſe, occurred before the committee.

27th February. Nathaniel Berry. Nature of freehold, "Organiſt." It was aſſerted, in ſupport of this vote, that the office for which he voted, did not require aſſeſſment. This was denied on the other ſide, and it was farther inſiſted, that at leaſt, in order to prove the office not aſſeſſable, the nature of it, and of the voter's appointment to it ſhould be ſhewn. The committee, adopting this opinion, reſolved, "That whenever any vote is objected to upon the ground of non-aſſeſſment to the land-tax, and the exemption from ſuch aſſeſſment is claimed on the ſcore of an office, the party maintaining the vote ſhall be called on to prove the nature of the office, and the appointment of the voter to ſuch office." In attempting to produce ſuch proof in the preſent caſe, it appeared that the appointment of the voter was only by the year; and the committee upon that ground decided the vote to be bad. This vote had been objected to for want of aſſeſſment only [s].

Committee take notice of the eſtate not being a freehold, though not made a ground of objection.

9th March. William Aſhfield. Nature of freehold, "Licenſed pariſh clerk." Upon this occaſion, the following rule being framed by the agreement of the counſel on both ſides, and adopted by the committee, was entered upon their minutes; "It is agreed, that the office of pariſh-clerk is *primâ facie* an office for life, and confers a right to vote, unleſs ſome deficiency of value, or other circumſtance, be proved to invalidate it; and that it does not require aſſeſſment [t]."

Agreed, that the office of pariſh clerk need not be aſſeſſed.

3d March. Robert Sturday. Nature of freehold, "one of the ſworn clerks of the court of Chancery." The ſeat having been vacant when the rate of 1801 was made, had not been aſſeſſed. The voter had been ſworn in, in Eaſter term 1801. The committee diſallowed the vote.

Office vacant at the time of making the rate.

[s] The reader will hereafter find that ſuch freeholders were held by the committee not to have a right to vote, unleſs they could ſhew that they were entitled by their office to ſome profit ariſing from land within the county of Middleſex.

[t] It will be obſerved, that the committee never decided that any office, from its nature, was exempt from the neceſſity of being aſſeſſed to the land-tax: they took occaſion to declare this, in the caſe of W. Ramſden, (ſee p. 72.) when their deciſion on Berry's vote (*ſuprà*) was mentioned by the counſel in argument. In the agreement reſpecting pariſh clerks, each party, probably, had a view to his own advantage.

25th April. William Chaplin. In this caſe, the committee determined, "that the office of ſexton, when not aſſeſſed to the land-tax, does not give a title to vote."

Exemptions from aſſeſſment; in caſes of deſcent, marriage, marriage-ſettlement, deviſe, or promotion.

It is provided by ſt. 20 G. 3. c. 17. ſ. 2. that the firſt clauſe (ſee p. 64.) ſhall not extend "to any perſon who became entitled to ſuch meſſuages, lands, or tenements, for which he ſhall vote, or claim to vote as aforeſaid, by deſcent, marriage, marriage ſettlement, deviſe[u], or promotion to any benefice in the church, or by promotion to an office, within twelve calendar months next before ſuch election; but ſuch perſon ſhall be entitled to vote at ſuch election, if the meſſuages, lands, or tenements, for which he ſhall vote, or claim to vote, as aforeſaid, have been, within two years next before ſuch election, rated or aſſeſſed to the land-tax, in the name of the perſon or perſons by or through whom ſuch perſon voting, or claiming to vote, as aforeſaid, ſhall derive his title to the meſſuages, lands, or tenements, for which he ſhall vote, or claim to vote, as aforeſaid, or in the name of ſome predeceſſor, within two years next before ſuch election, of ſuch perſon claiming to vote in reſpect of any promotion to any benefice in a church, or promotion to an office, or in the name of the tenant or tenants of ſuch perſon or perſons, ſuch tenant or tenants actually occupying ſuch meſſuages, lands, or tenements." By ſt. 30 G. 3. c. 35. ſ. 1. it is enacted, that the above act ſhall not be conſtrued ſo as to prevent any perſon from voting in reſpect of any meſſuages, &c. aſſeſſed for ſix calendar months next before ſuch election, towards the land-tax "in the name of the perſon claiming to vote, or for or in reſpect of any meſſuages, lands, or tenements, to which the perſon ſo claiming to vote ſhall have become entitled by deſcent, marriage, marriage ſettlement, deviſe, promotion to any benefice in the church, or promotion to any office, within twelve

[u] The Bedfordſhire committee held, that where the eſtate was deviſed to a minor, the year began to run when he came of age. 2 Lud. 528.

calendar

calendar months next before ſuch election, and which meſſuages, lands, or tenements, ſhall have been within two years next before ſuch election charged or aſſeſſed to the land-tax, in the name of the perſon or perſons by or through whom ſuch perſon ſo claiming to vote ſhall derive his title to ſuch meſſuages, lands, or tenements, or of ſome predeceſſor of ſuch perſon ſo claiming to vote, although the name of the tenant or tenants actually occupying ſuch meſſuages, lands, or tenements, ſhall not be inſerted in ſuch aſſeſſment, according to the form of aſſeſſment to the ſaid recited act annexed." S. 2. extends to tenements rated in the name of the tenant, where the name of the voter, or his predeceſſor, &c. is omitted.

No queſtion occurred during the ſcrutiny upon theſe clauſes as they reſpect the ſucceſſion of perſons to their freeholds by deſcent, deviſe, marriage ſettlement, or promotion: the following caſe occurred, where the voter had acquired his freehold within the year, by marriage.

Premiſes muſt be aſſeſſed in the name of ſome predeceſſor, who was in poſſeſſion within two years of the election.

17th March. John Baldwyn voted for premiſes in his own occupation. In the aſſeſſment the Duke of Portland was named as proprietor, and James Poulter as occupier. The premiſes appeared to have been conveyed from the Duke to one Vincent, in January 1799, by Vincent to George Poulter in March 1800, and to have been deviſed by George Poulter to his wife Elizabeth, by a will proved 23d January 1801. Elizabeth married the voter in September 1801. It was ſufficiently proved that the name of James in the aſſeſſment, was put there by miſtake for George. It was contended, that the premiſes having been rated within two years of the election, in the name of "ſome predeceſſor," (the D. of P.) through whom the voter derived his title, his right was protected by the ſtatutes 20 G. 3. c. 17. ſ. 2. and 30 G. 3. c. 35. ſ. 1. and that neither of theſe ſtatutes required, that the predeceſſor, in whoſe name the premiſes were aſſeſſed, ſhould be alſo ſhewn to have been the owner of them within two years of the election. To this it was anſwered, that by the plain meaning of the ſtatute, it was neceſſary that the word "predeceſſor[w]" ſhould be held to ſignify

[w] The word "predeceſſor" in 20 G. 3. c. 17. is only applied to caſes *of promotion* in the church, or to an office: but in 30 G. 3. c. 35. it may be applied generally, to all the exempted caſes.

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ſome proprietor within two years before the election; and not any perſon, who, at any diſtance of time, might appear to have been the owner of them. The committee determined the vote to be bad. See 2 Lud. 329. 530.

V. Queſtions relating to the eſtate of the voter; ariſing,
1, from the nature of it.

The reader will obſerve, that in all caſes, the party making the objection was called upon, in the firſt inſtance, to ſubſtantiate it.

13th June. Robert Seamon voted for land-tax which he had purchaſed. By ſt. 38 G. 3. c. 60. ſ. 99, land-tax, purchaſed, is directed to be conſidered as perſonal eſtate, except in certain caſes. (See ſ. 32, 40.) This vote, (as well as many others, who had voted for property of the ſame deſcription) was diſallowed*. Land-tax purchaſed.

22d March. William Warrell. Freehold; "Organiſt of the New church in the Strand." It appeared from the minutes of the veſtry, that the voter had been appointed for life, and that an annuity had been granted him for his own life and for the life of another, ſecured by deed upon lands in Surrey. The counſel for the petitioner contended, that it was the office, exerciſed in Middleſex, which gave the right to vote; but the committee determined the vote to be bad. Offices. Organiſt in Middleſex with an annuity ſecured on lands in Surrey.

28th March. John Merrick voted for his office of ſexton. It was proved in ſupport of the voter's title, that he had acted as ſexton of Uxbridge; and an entry was ſhewn from the proceedings of the veſtry, of his election as ſexton, 29th Auguſt 1799; but it did not appear that he had been elected for life: and no proof being given that the office was for life, the committee determined the vote to be bad. A ſimilar determination took place afterwards, on the ſame day, upon the vote of George Gladman, the ſexton of Ruiſlip. A general appointment of ſexton, not held to be for life.

* It does not appear that this proviſion is re enacted by ſtat. 42 G. 3. c. 116. which repeals the proviſions of the former acts, except with reſpect to purchaſes before 24 Aug. 1802. By ſ. 154 of that ſtatute, it is enacted, that the purchaſer of ſuch land-tax after regiſtry of the contract and certificate, (ſee. ſ. 38. 164) ſhall be "taken to be in the actual ſeiſin and poſſeſſion of a yearly rent or ſum as a fee-farm rent," &c.

Parish clerk appointed generally, confirmed by the bishop during pleasure.

24th April. Job Kentish. Nature of freehold, "Licensed clerk of Hendon." This case was first brought on 17th April, and stood over for further evidence. To prove that the voter had not an estate for life there were produced, first, an appointment of him as clerk by the parson of the parish, generally, without any term named for the continuance of his office; secondly, a license from the Bishop of the diocese, in which the appointment was confirmed and approved, "during our pleasure, and no longer." It was argued from hence that the voter held his office at the pleasure of the Bishop; or at least, that there was sufficient evidence of this office not being for life, to put the party who supported the vote on the proof of the contrary. It was answered, that the license of the Bishop was not necessary to the validity of the appointment. Peake *v.* Bourne, Str. 942. That a general appointment is an appointment for life. A mandamus has been granted to restore a parish-clerk[y]. "At common law a parish-clerk is in for life, without deed;" 2 Salk. 536. and see 11 Mod. 261. *Reg. v.* Dr. Walk. The committee decided that the vote was good.

Clerk of the Peace.

30th April. Henry Collingwood Selby voted for the office of clerk of the peace for Middlesex. He was assessed "for his office of clerk of the peace for the county of Middlesex 1200*l. per ann.* 55*l.*" The circumstances of his case were shortly these: the clerk of the peace is appointed for life by the Custos Rotulorum. The emolument of his office consists of fees taken in the court at the sessions house upon indictments, recognizances, and other proceedings had at that court. He is provided with certain apartments, *viz.* an office, and a record-room, and a chamber for the residence of himself or his deputy in the sessions house. The sessions house was built for the use of the county of Middlesex, in pursuance of an act of parliament passed 18 G. 3. by which certain commissioners were empowered to purchase land for that purpose: and by which, the use and occupation of the sessions house is directed to be from time to time regulated by the justices of the peace for the county. After

[y] See R. *v.* E. Warren, Cowp. 371. and Just. Burn's Eccl. Law, tit. Parish *Clerk.* R. *v.* Gaskin, 8 Term Rep. 209. And see 1 P. Wms. 29. 2 Gibs. Cod. p. 198. Canon, 137.

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an argument, the ſubſtance of which the reader will find collected on another occaſion, (*infra*, vote of John Ord) the committee determined, "that H. C. Selby, not having a freehold intereſt in houſe or land in right of his office, is a bad vote."

Upon the principle of this determination the committee proceeded to ſtrike off the votes of many perſons, who had voted in right of offices exerciſed in the courts of Weſtminſter Hall, or whoſe emolument conſiſted of fees from the ſuitors of thoſe courts; ſuch as the King's Coroner and Attorney, the Clerk of the King's Bench Treaſury, the Prothonotary of the Common Pleas, the Filacer of the county of Middleſex, &c. and the officers of the court of Chancery. They alſo rejected the votes of ſeveral perſons, who exerciſed certain offices in Weſtminſter Abbey. The reader is referred to the vote of Mr. Ord for the principal arguments made uſe of on each ſide of the queſtion. A few of the diſtinctions attempted to be taken in particular caſes are ſubjoined.

Office, of which no profit ariſes from land within the county.

12th June. John Ord. Reſidence, on the poll, "John Ord, Lincoln's Inn Fields." Situation of freehold, "in Chancery." Nature of it, "Maſter in Chancery." Occupier, "Self." Objections, "No freehold: no freehold in the occupation of the tenant named on the poll." The office of Maſter in Chancery is an office for life, the emoluments of which ariſe from certain ſalaries and eſtabliſhed fees paid by the ſuitors of the court of Chancery[z]. The buſineſs of the office is carried on in a large building, ſituated in Southampton Buildings, Chancery Lane. There is one large office for the public buſineſs common to all the 10 maſters; beſides this, each maſter has, ſeparately, one room which he makes uſe of for himſelf; another for the uſe of his ſenior clerk; and a third, for his under clerks. There are alſo two other rooms; one, a repoſitory of proceedings; another, a lobby. Theſe rooms are ſolely uſed for purpoſes of buſineſs, and are inhabited, or ſlept in, by no one[a].

[z] See Com. Journ. 21 Feb. 1798; and the report of the committee of finance, 26 June 1798, Appendix, K. 1. The printed copy of this report was received in evidence by the committee, it being firſt proved, that the original had been ſought for, and could not be found.

[a] See Holford v. Copeland, 3 Boſ. & Pull. 129.

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The whole eſtate, buildings, &c. are veſted in fee in the King [b], and the furniture of the rooms, offices, &c. is his property. The buildings are aſſeſſed to the land-tax, but not to the poor's rate.

It was objected on the part of the ſitting member, that this was not ſuch a freehold as would confer a right to vote. The counſel for the petitioner ſupported the vote by the following arguments.

Argument in ſupport of the vote. Statutes 8 & 10 H. 6.

The law requires, that every elector for a county ſhall have a freehold eſtate of the annual value of 40*s*. By ſt. 8 H. 6. c. 7. he muſt have "free land or tenement," to that amount. By ſt. 10 H. 6. c. 2. he muſt have "freehold" within the ſame county. If the office in queſtion be a tenement, or freehold, of the annual value of 40*s*. in the county of Middleſex, it is ſuch as, within the general purview of the law, and of the above-mentioned ſtatutes, will confer a vote. It is clear that a man may have a freehold in his office; and that an office is compriſed within the word tenement. This is an ancient office of profit; and an aſſiſe, or a writ of *novel diſſeiſin*, lies for it; which is an action ſtrictly confined to real property, and for the recovery of freehold rights. See Bacon's Abridgment, Tit. Offices and Officers, G. "It is held clearly that an aſſiſe lay at common law for an office;" i. e. an office of profit; and it is there ſaid, that this remedy ſubſiſts in the caſe of offices that are held in tail, or for life, as well as in fee. In Fitzherbert's *Natura Brevium*, 192 E. is a form of a writ of *novel diſſeiſin* for the office of Serjeant in the abbey of Peterborough, which the demandant claims to be his right and inheritance [c]; and in p. 178, F. of the ſame book it is ſaid, "a man ſhall have an aſſiſe of *novel diſſeiſin* of an office, if he have the ſame for life, and the writ ſhall be, that he *diſſeiſed* him of his freehold in D.; and he ſhall make his plaint of the office, and ſhew his title in the plaint." See alſo the note (a) at the end of the ſame chapter.

The law is laid down ſtill more expreſsly in Jehu Webb's caſe, 8 Co. Rep. 47. a. "It appears from the books that

[b] By ſtat. 32 G. 3. c. 42.

[c] See Lib. Aſſ. 8. pl. 7. 10. pl. 11. 11. pl. 22. 30. pl. 4.

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an aſſiſe lay of an office *ut de libero tenemento*, at the common law;" and ſeveral inſtances are given, of offices which have become the ſubject of that ſort of action; as the bailiwick of keeping a park, the bedelry of an hundred, or ſoke; and "exception was taken, that it was a profit iſſuing out of no freehold; but this was not allowed." So the office of Serjeant in a cathedral church; of packing of cloths; of Sheriff; of Clerk of the Crown in Chancery; Filazer in the Common Pleas, &c. &c. In Lord Raymond's Reports, vol. 1. p. 158. is the caſe of an aſſiſe brought in Kent, *de libero tenemento*, and the plaint was for the office of clerk of the peace. It appears therefore, that theſe offices are tenements; that they are freeholds of the nature of real property; ſubject to the ſame forms of conveyance, and to the ſame legal remedies, and proceedings, as other real property, of whatſoever kind. And it is to be remembered, that ſuch offices only come under this deſcription, as are offices of profit, not merely of charge; and as are alſo of a public nature, and either erected of old, or, if in modern times, of neceſſity, and for the good of the public. Other duties or appointments of a private nature, although a man may have them for life, &c. are merely perſonal, and are not even entitled to the name of offices, in the proper and legal ſignification of that term; but are called employments. See Bacon's Abridgment, Tit. Offices and Officers, A. B. C. D. There is no doubt that the office in queſtion is ancient, public, and neceſſary; that it is ſuch as a man may have a freehold in; and that in the preſent inſtance, the voter has a life eſtate in it, and that he exerciſes the duties of it within the county of Middleſex. He therefore has a right to vote in that county as a freeholder. The ſtatutes, which concern elections in counties, contain nothing adverſe to his claim: but on the contrary lean in favour of it. It has already been obſerved, that the ſtatutes 8 & 10 H. 6. compriſe it, within the meaning of the words "freehold and tenement." The ſt. 12 Ann. c. 5. exempts from the neceſſity of aſſeſſment perſons voting for rents, tithes, or other incorporeal hereditaments, which have not uſually been aſſeſſed, &c. It is clear, that this office is an incorporeal

real hereditament. The ſt. 18 G. 2. c. 18. ſ. 4. contains a ſimilar exemption in favour of perſons voting for ſeats belonging to offices; and in ſ. 5, it provides for the rights of perſons who have become entitled to vote within 12 months by promotion to an office. Theſe paſſages contain an acknowledgment by the legiſlature that offices confer a right to vote. If it had been thought to be the land, which was held by virtue of the office, and not the office, that gave the right, it would have been ſo expreſſed, but ſuch a doctrine is negatived by the very words of the ſt. 12 Ann. before cited, which uſes the words incorporeal hereditaments; whereas, the land, &c. appertaining to the office, would be a corporeal hereditament, were that conſidered to be the foundation of the right. Beſides, it frequently happens that the freehold of the land, &c. annexed to the office, may be in ſome other perſon, and the intereſt of the officer therein may be only an eaſement, or incorporeal right of enjoyment, incidental to his office, in which his freehold is properly ſaid to exiſt [d].

Argument againſt the vote.

The counſel for the ſitting member inſiſted that the office of maſter in Chancery did not confer a right to vote.

An office is the duty which a man is bound to perform for certain fees and emoluments. It is the conſideration which he pays for the advantages derived to him from the profits of it. It is, in this reſpect, like the rent which is paid for land; or rather, it ſtill more nearly reſembles the ſervices, which in ancient times uſed to be rendered, as the terms on which lands, caſtles, &c. were held. As it is clear, that the land confers the right to vote, and not the rent or

[d] See Sone v. Aſhton, 3 Burr. 1287. The queſtion was, Whether the office of marſhal of the King's Bench was a ſufficient qualification for a commiſſioner of the land-tax in Surrey? By the ſt. 33 G. 2. c. . the qualification muſt ariſe out of lands and *tenements*. The freehold of the priſon, marſhall's houſe, &c. is in the crown. It was inſiſted, that the office was not ſuch a tenement as the act required. Lord Mansfield, "Is not his office a tenement? and he has a qualified freehold in it. He is qualified, both within the words, and the intention of the ſtatute. Is not the Maſter of the Rolls qualified for the houſes which belong to him in the right of his office? I know that the Maſter of St. Catherine's has ſat in parliament under the qualification of his office."

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ſervice which is paid for the land, it ſhould follow that the office which is the burden to be diſcharged cannot be the foundation of ſuch a right; and as for the emoluments which ariſe from the diſcharge of that burden, it is evident that they are in this caſe merely perſonal, and not in the leaſt connected with land, or any ſubject of a real nature. Strong objections ariſe againſt the claim of this voter, when it is conſidered in a parliamentary view. Knights of the ſhire are underſtood to repreſent the landed intereſt of the county, for which they are returned. The electors are the members of the county court; but there is no trace of ſuch officers as theſe having ever been ſummoned to, or having appeared at that court, or of their being conſidered as members of it. See 1 Heyw. 44. Neither is there any trace of their being called upon to contribute to the wages of the knights, which has been thought by ſome to be a criterion, by which thoſe who formerly had a right to vote might be diſtinguiſhed. It is ſaid, that this office is compriſed within the meaning of the word "tenements." But that word will be found to include only ſuch inheritances as concern the land. Lord Coke, in his commentary upon the ſtat. Weſtm. 2. 13 Edw. 1. (commonly called *de donis*) fully explains this diſtinction. The word tenements, he ſays, includes not only all corporate inheritances, which are, or may be holden, but alſo, "all inheritances iſſuing out of any of thoſe inheritances, or concerning, or annexed to, or exerciſable within the ſame, though they lie not in tenure: as rents, eſtovers, commons, or other profits whatſoever granted out of land: or uſes, offices, dignities, which concern lands or certain places, may be entailed within the ſaid ſtatute, becauſe all theſe favour of the realty. But if the grant be of an inheritance merely perſonal, or to be exerciſed about chattels, and is not iſſuing out of land, nor concerning any land, or ſome certain place, ſuch inheritances cannot be entailed, becauſe they favour nothing of the realty." The office of Maſter in Chancery cannot be ſaid to favour of the realty; it does not concern land; but is in its nature merely perſonal; it does not relate to any particular place; nor is it exerciſeable in any particular

Co. Litt. 20. a.

ſpot, but may be removed at the king's pleaſure. It is admitted that the voter has a freehold intereſt, having an eſtate for life in it; and for this reaſon it is, that it may be the ſubject of a writ of aſſiſe, &c. but it does not follow from thence that it is of the nature of a real eſtate, or connected at all with land, or can be conſidered as the foundation of the elective right. If it were ſo, and if every thing which is the ſubject of an aſſiſe would alſo give a right to vote, there are many other things that may be named, which never yet were ſuppoſed to give that right; as, a corody, &c. It cannot be ſuppoſed that the tenant of a corody, or a packer of wool, or a ſerjeant at arms, or the keeper of a church, would be conſidered as members of the county court; yet all theſe are ſaid by Lord Coke to be officers, who may have an aſſiſe for their offices. It is ſaid that the ſtatutes 12 Ann. and 18 G. 2. expreſsly name offices; but on the contrary they only ſpeak of thoſe who claim a right to vote in reſpect of any meſſuages or ſeats belonging to offices, and not of the offices themſelves: if theſe ſtatutes afford a ground of argument on either ſide, they ſeem rather to ſhew, that offices, as ſuch, do not give a right; but that there being certain offices to which houſes or ſeats are attached, he who by virtue of his office has a freehold intereſt in a houſe, &c. may vote for the houſe, though he may not vote for his office. It is plain that in the preſent caſe the voter can claim no right in reſpect of the place where he exerciſes the duties of his office, ſince the freehold of it is veſted in the crown. Laſtly, it is to be conſidered, what inconvenience would follow, ſhould offices, ſuch as theſe, whoſe profits are merely perſonal, and not at all connected with land, be conſidered to give a right to vote; ſince every employment, even that of menial ſervants, might be given for life, and might, upon the ſame grounds, be conſtrued to be a freehold, and an office.

The vote was determined to be bad.

Office of ſix-clerk.

13th June. Charles Edmonſtone, one of the ſix-clerks of the court of Chancery. It appears from the report of the Committee of Finance made to the Houſe of Commons in 1797, that theſe officers are appointed for life, by the Maſter

ter of the Rolls; that their emoluments conſiſt of certain ſalaries paid at the public offices, and fees from the ſuitors; and that the office is exerciſed by them in perſon in Chancery-lane. The former building uſed for this purpoſe having become ruinous, a new one was erected under the proviſions of ſtat. 25 G. 3. c. 56., by which the land directed to be the ſite of the new building was veſted in the ſaid ſix clerks, to hold to them, and their ſucceſſors for ever. It was attempted to diſtinguiſh this caſe from the preceding, by obſerving that here the land was ſpecifically conveyed to the clerks, and that they had an intereſt in the land, for which they might vote; but it was anſwered, that this intereſt was veſted in them as a corporation aggregate, and that individual members of a corporation could not vote in reſpect of their particular ſhare of an eſtate veſted in the corporation collectively: for this was cited the caſe of Dr. Stone, one of the 12 vicars of Hereford, Glouceſterſhire caſe, p. 136. where it was reſolved, That he, being part of a corporate body, compoſed of a cuſtos and 11 vicars of Hereford, had not a right to vote for his part of the eſtate veſted in the corporation. The vote was determined to be bad [c].

Land conveyed to them as a corporation aggregate.

13th June. Ch. Arnold, one of the ſworn or ſixty clerks in the court of Chancery. The ſixty clerks practiſe as attornies or ſolicitors in the court of Chancery, in filing bills, engroſſing proceedings, &c. Their emoluments ariſe from fees paid to them, in the cauſes in which they are employed. The office of each ſix-clerk is divided into ſeats, of which one is allotted to each ſworn clerk. The ſworn clerks are appointed by the Maſter of the Rolls, on the recommendation of the ſix-clerk in whoſe office the vacancy is, which is to be ſupplied. In defence of the vote it was obſerved, that a ſeat was attached to this office, which brought it within the ſtatutes 12 Ann. c. 5. and 18 G. 2. c. 18.; but it appearing that no profit whatever was derived by the voter from the ſeat, all the emoluments of the office ariſing from the fees paid him by his employers, the committee decided the vote to be bad.

Office of ſixty clerk.

[c] See 1 Heyw. 71. 1 Journ. 714. 798. Dalton's Sheriff, p. 333. 2 Lud. 368.

Sub-regiſter. 13th June. John Coppinger, ſub-regiſter of the of Chancery. This office has no land, nor any ſalary a from land attached to it, nor any houſe, except for the neſs of the office. The emoluments entirely ariſe fro fees paid by the ſuitors of the court. The counſel fc petitioner, underſtanding the committee to have determ that a ſeat connected with an office (the profits conſiſti fees only) does not ſufficiently give to the office the n of real property, gave up this vote, and it was declarec

Clerk of the Petty-bag. 13th June. Thomas Mendham, clerk of the Petty office. The only circumſtance, which diſtinguiſhed caſe from the foregoing, was that this voter had let a l ing adjacent to his office and which was formerly uſe part of his office, for the rent of 24 guineas *per a* It was argued, that in this caſe, a profit was derived the land, or meſſuage itſelf, which was annexed t

Letting out part of the building deſtined for the buſineſs of the office. office. It was anſwered, that the letting of a part c building allotted for the office was a perverſion of its poſe, and would make no difference in the preſent que that in the former caſes had the building ſet apart fo buſineſs of the offices to which they appertained, bee out to private tenants, it would not have altered th with reſpect to the vote, ſince the uſe of the buildin properly for the accommodation of the public, and n the private emolument or advantage of the officer. committee decided the vote to be bad [d].

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[d] No caſe is mentioned by any author upon the ſubject of elections, of a vote being queſtioned, on account of its being given for an office; nor has the reporter been able to find an inſtance among the Journals of a deciſion upon that ſubject, ſo far as he has had an opportunity of ſearching them for this purpoſe. The paſſage that occurs in the caſe of Cambridgeſhire, 12 Feb. 1693, 11 Journ. 93. is hardly of ſufficient conſequence to be mentioned: a witneſs ſaid, that Davis (a voter objected to) "had only a barber's place to a college, with a ſalary of 6*l.* a-year; and a ſinging man's place at E had no freehold." And in th Yorkſhire, 22 April 1736, 21 696. it was contended by the for the petitioner, that ſeveral have been diſqualified by the given of their being ſchoolmaſt riſh clerks, curates, and hoſpit See 2 Lud. 587. But it does tinctly appear upon what grou diſqualification was contended

It might be expected that ſe thorities would be found, wit to a ſubject not wholly diſſimil the preſent, namely, the qualific

Among the other officers whoſe votes were ſtruck off by the committee, were the following:

King's coroner and attorney. K. B.

Clerk in court. K. B.

King's

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jurors under ſt. 2 H. 5. c. 3. which requires them to have *lands or tenements* of the yearly value of 40ſ. The reader will find a number of caſes referred to, in Co. Lit. 156. b. 157. a. 272. b. Hawk. P. C. book 2. chap. 43. Dalton, in his Office of Sheriff, p. 333. treating of the conſtruction put upon the words *lands or tenements* in ſt. 8 H. 6. cap. 7. (reſpecting electors) cites ſeveral of the poſitions laid down in Co. Lit. 272. b. with reſpect to jurors.

He lays down the following rules reſpecting the conſtruction of the ſtat. 8 H. 6. "He that hath no other freehold (or inheritance) but advowſons of churches, though they be of the value of 4cs. (or 40*l.*) by the year, yet thereby he hath no ſuch ſufficiency, nor ſuch freehold land or tenement, as that thereby he may be a chooſer of the knights of the parliament, &c.

"He which hath no other freehold than common of paſture, though that be to the value of 40ſ. *per ann.*, yet he may be no chooſer: but he which hath a freehold houſe or lands, of the yearly value of 30ſ., and beſides hath thereto belonging a common of paſture appendant, to the yearly value of 20ſ. he may be a chooſer, &c.

"Otherwiſe it is, if his houſe be a new-erected tenement, or erected within the time of memory; for that common appendant muſt be by preſcription; and therefore, except ſuch houſe be of the yearly value of 40ſ. beſides the common, it enableth him not.

"If a man hath a free warren of coneys, the which *communibus annis* is worth 40ſ. *per annum*, this is ſufficient freehold, &c.

"If a man maketh 40ſ. by the year (*communibus annis*) of his woodſales, coal-mines, tithes impropriate, or the like, being his freehold, theſe are ſufficient, &c.

"If a man hath 40ſ. rent *per annum*, or an annuity of 40ſ *per annum* iſſuing out of lands, during his life, this is ſufficient.

"Note, that by the common law, all freemen of England, had a voice in the election of theſe knights, within the counties where they dwelt; but now by theſe ſtatutes of 8 H. 6. & 10 H. 6. they are reſtrained to ſuch as have 40ſ. freehold *per annum*, within the county, &c.

"Again, it ſeemeth they muſt be ſuch freeholders, as do contribute to the wages of the knights of the ſhire; or elſe ſuch as are ſuitors to the county court."

It is to be lamented that the characters by which we are directed to diſtinguiſh who are electors of knights of parliament, are themſelves ſo obliterated by time and diſuſe, as to be no longer diſcernible. No account either of the members of a county court, or of thoſe upon whom the knights wages were levied, has been preſerved, of ſufficient minuteneſs or accuracy to enable us to judge whether any, or what, difference exiſted, as to the nature, or quality of the freehold.

By 28 G. 3. c. 36. ſ. 6. it is required of every perſon before he votes in a county election, to make a declaration (among other things) that the eſtate for which he claims to vote "conſiſts of (ſpecifying whether the ſame conſiſts of lands, or of meſſuages, or of tithes, or of an *office*, or of a rent-charge"

King's bench office.
Clerk of the treaſury. K. B.
Secondary in K. B.
Curſitor.
Filacer.
Attorney of the pipe.
Uſher of the common pleas, and exchequer.
Sealer in the court of chancery.
Deputy chirographer.
Prothonotary.
Clerk of King's ſilver.
King's remembrancer.
Clerk of the juries.
High bailiff of Weſtminſter.
Official of the arch-deaconry.
Steward of the dean and chapter.
Regiſter of fines.
Lay vicar.
Abbey brewer, and butler.
Bell-ringer to the abbey.
Gardener to the abbey.
Receiver to the abbey.
Cook to the abbey.
Organ blower to the abbey.
Choriſter.
Alms-man.
Abbey ſacriſt,

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charge"—and "if the ſaid eſtate conſiſt of an office, then naming the ſame.") And ſee Schedule, No. 1. ſpecifying the form of the regiſter of freeholders: "Freehold eſtate: (that is) whether it be lands, or meſſuage, or tithes, or *office* of (naming ſuch office." immediate object of this ſtatute provide a regiſter of all the free in counties: but it was never force; and was repealed by ſt. 2 c. 18.

Quel

Queſtions relating to the eſtate of the voter: ariſing, 2. from the value of it [e].

16th March. John Beaumont. In this caſe, the committee determined, "That a mortgage on a freehold ſhall be conſidered to invalidate the vote, if the intereſt paid by the voter reduces the value of ſuch freehold below 40*s.* *per annum*." It appeared however, that although the mortgage in this caſe greatly exceeded the value of the particular eſtate in right of which the vote was given, there were other eſtates conveyed alſo in mortgage by the ſame deed, the rents and profits of which were much beyond the intereſt of the ſum borrowed. Under theſe circumſtances the committee determined the vote to be good. The caſe was argued at great length, but nothing material having been added to the arguments reported by Mr. Luders in the caſe of Richard Stringer, 2 vol. p. 450, it is unneceſſary to repeat them here [f].

Value reduced by mortgage below 40*s.* avoids the vote.

2d May. Samuel Chaſe. He had mortgaged the premiſes for which he voted, in the year 1782, for the ſum of 350*l.* They were ſtated to be worth 40*l.* *per annum*. In 1798 the intereſt being in arrear, he gave up the poſſeſſion to the mortgagee, permitting him to receive the whole of the rents and profits, to be applied by him, not only to the

Mortgagee ſuffered to be in poſſeſſion of an eſtate of much greater value than the incum-

[e] It was determined by the Bedfordſhire committee, 2 Lud. 444. that if a voter gives in a freehold on the poll which is not worth 40*s.* a year, the vote is to be conſidered as a bad one, notwithſtanding he may be poſſeſſed of other freeholds amounting to more than 40*s.* S. v. p. 446. But they held that it was not neceſſary that the whole of it ſhould be aſſeſſed. p. 525. The freehold conſiſted of land and houſes: and the land only was aſſeſſed, which brought the value of the freehold aſſeſſed, below 40*s.* See *ante* p. 51.

[f] The Bedfordſhire committee reſolved "that the intereſt upon a mortgage, the mortgagor ſtill being in poſſeſſion, is ſuch a charge upon the eſtate within the meaning of the ſtatutes, as to affect the rights of the voter." 2 Lud. p. 467. The Cricklade committee determined, "That the mortgagor in poſſeſſion of lands of the value of 40*s.* a year; and the deviſee in poſſeſſion of lands of the value of 40*s.* a year, deviſed ſubject to the payment of debts and legacies, are entitled to vote." Ib. p. 471. The Buckinghamſhire, "That a mortgage is ſuch a charge on land, as may reduce the value of the freehold below what may entitle a perſon to give his vote for a knight of the ſhire." Ib. See 1 Heyw. 91. Simeon, p. 85—88. By ſt. 28 G. 3. c. 36. (mentioned *ſupra*. p. 102.) ſ. 6. the voter was required to declare that his freehold was of the yearly value of 40*s.* "over and above the intereſt of any money ſecured by mortgage upon the ſaid eſtate," &c.

brance: mortgagor permitted to vote.

reduction of the arrears, and the diſcharge of the growing intereſt, but alſo to the payment of the principal money. In 1803 the arrears had been paid off, and the principal debt had been reduced to 260*l.* The voter, up to the time of the trial, continued out of poſſeſſion, and the rents and profits were ſtill received by the mortgagee. The committee decided the vote to be good.

Value under 40*s.*

18th April. Matthew Rolph. Objection, "value under 40*s.*" The land for which he voted was an orchard, in quantity about one rood. Three witneſſes were called who valued it at about 20*s. per annum* in the ſtate in which it was at the time of the election: but they ſaid there had been a cottage there formerly, then in ruins, and that a new one had been built ſince the election. It was ſaid, that the actual value in the particular year of the election was not ſo much the queſtion, as the reaſonable value of the land, &c. in its uſual ſtate: it might happen, that very valuable property might produce nothing in the year previous to an election [g]. It was anſwered, that the true criterion of the value, was the rent which might fairly be expected for the property, and not what might poſſibly be made by the tenant in the courſe of one year. The vote was determined to be bad [h].

Meaſure of value.

[g] See ante, p. 27.

[h] The Bedfordſhire committee decided, 2 Lud. 450. "That the value of a freehold, in right of which the owner votes, is the rent which a tenant would give for it; and not what the owner, occupying it himſelf, may poſſibly derive from it." They conſidered the vote of J. Southwell good, who was entitled to a ſixth part of a meſſuage let at 8 guineas a year to a tenant, who was bound to pay the land-tax of 2*l.* 4*s.* 0*d.* and to expend 3*l.* annually in repairs. Including theſe two ſums, the voter's ſhare amounted to 2*l.* 2*s.* 2 Lud. 447. They afterwards paſſed a reſolution, "that the land-tax, when paid by the tenant, conſtitutes a part of the rent paid by him for the land, and is to be conſidered as part of the income in right of which the owner votes." A ſimilar motion reſpecting the houſe and window tax, was negatived. P. 476. See ſt. 18 G. 2. c. 18. ſ. 6.

Dalton's Sheriff, p. 333. "If A hath lands to the value of 40*l. per ann.* and letteth the ſame out to another for life, reſerving no rent, or but 20*s.* or 30*s.* rent *per annum*, this ſeemeth not to be ſufficient freehold for A. during the term, &c. to give his vote.

"Yet if he letteth ſuch his lands to another but for years (though for divers years) reſerving only 20*s.* or 30*s.* rent *per annum*, (or *abſque aliquo reddendo* during the ſaid years, yet here he may be a chooſer, &c. in regard of the freehold in him."

17th

17th April. A. D. O'Kelly. It was objected to him, that his freehold was under the value of 40*s.* and the books of aſſeſſment were tendered in evidence, from which it appeared that his freehold was rated at a leſs value. But the committee determined, that "no proof whatever of the actual value of the freehold could ariſe from entries on the books of aſſeſſment." The ſame determination took place in ſeveral other caſes [1]. Sum named in the aſſeſſment no evidence of value.

Queſtions relating to the eſtate of the voter: ariſing, 3. from the local ſituation of it.

30th June. Thomas Foſter voted for two ſhares of Fulham Bridge [k]. The tolls of the bridge are collected in Middleſex. By ſt. 12 G. 1. c. 36. ſ. 32. it is enacted, that all actions brought againſt any perſons for any thing done in purſuance of that act (for building the bridge, &c.) or in relation to the premiſes, ſhall be laid in Surrey, and not elſewhere. It was attempted to be argued from this clauſe, that the eſtate muſt be conſidered to be in Surrey, and not in Middleſex, ſince it could only be recovered, or protected, by actions brought in the former county. It was anſwered, that the ſtatute was not intended to be applied to actions brought reſpecting the title to the bridge, as ejectments, &c. but to perſonal actions brought for things done in purſuance of the act: ſecondly, that if it extended to all kinds of actions, ſtill, that the ſtatute had not altered the local ſituation of the freehold in other reſpects, and for other purpoſes. The committee allowed the vote. Freehold in Middleſex, alth ugh actions reſpecting it directed to be brought in Surrey.

Queſtions relating to the eſtate of the voter: ariſing, 4. from the voter's title to it.

17th March. James Cole. To prove the voter's title to the freehold, (upon the objection of non-aſſeſſment) a wit- Contract of ſale, and poſſeſſion

[1] The ſame was decided by the Bedfordſhire committee, 2 Lud. 448. It is remarkable, however, that in the preamble to ſt. 12 Ann. c. 5. it is ſaid that "it was *only* intended thereby," (*i. e.* by ſt. 10 Ann. c. 23.) "to *aſcertain* the value of lands or tenements, by making the proportion paid to the public taxes, church-rates, and pariſh duties, or ſuch of them to which the ſame were uſually charged or aſſeſſed, the *meaſure* of the value thereof."

[k] See 1 Doug. Rep. in K. B. p. 305. n. 2.

neſs

given a year before the election; though the conveyance executed within the year.

neſs was called, who depoſed, that he, on the part Duke of Portland, the former proprietor, had cont with the voter for the ſale of the premiſes in the year that the voter had ſince that time been in the poſſeſſ the rents and profits of them; but that no conveyan been executed till within a year of the election. The mittee determined the vote to be good [1].

Purchaſe and poſſeſſion of the premiſes long before the election: conveyance afterwards.

28th June. Benjamin Vulliamy. The conveyar the voter was in 1803; but it was proved that he ha the purchaſe money in 1798, had been let into poſſeſ that time, and had enjoyed the rents and profits of the voted for, from that time. His vote was determined good.

Same point.

2d July. Thomas Powis. To prove the voter's t conveyance to him was ſhewn, dated Auguſt 1801. tenant of the premiſes being called as a witneſs, de that he had paid rent to the voter, by the directions former owner, long before that time. The vote w clared good.

Eſtate deviſed to be ſold for payment of debts; ſurplus to the voter: he may vote before the ſale.

28th March. Richard Rice. His freehold was a in the name of Ann Cook. The property had been d by Richard Chandler Cook to his wife for life, remair truſtees to ſell for the purpoſe of paying debts and le the ſurplus to be divided amongſt Richard, Thoma John Rice. The tenant for life died July 14, 1802. eſtate had not been ſold. It was objected, that the re der-men took only an intereſt in a perſonal eſtate. anſwered, that they took an equitable intereſt in the fr eſtate immediately upon the death of the tenant for lif that it was incumbent on thoſe who impeached the v

[1] So, the Bedfordſhire committee determined, tha: where the contract was before the election to ſell on 25 Mar. 1784, 13 days before the election, and the conveyance was made after the election, bearing date 25 Mar. the vendor had no vote. 2 Lud. p. 428. The Glouceſterſhire committee, 1777, ſtruck off the vote of one who had contracted for the eſtate, and had into poſſeſſion in 1774; where veyance was not executed ti p. 163. And they alſo ſtruck vote of one who had ſold his fore the election, taking a bo the purchaſer, for his enjoyme rents and profits during his life

ſhew that the land had been ſold, and converted into money. The committee determined the vote to be good [m].

Land attached to an office: what proof of title is ſufficient.

17th April. Charles Pegler. He voted for land in Great Stanmore, which he held as clerk of the pariſh. The appointment of the voter to his office by the parſon of the pariſh was proved; and evidence was given, that the land in queſtion was in his poſſeſſion, and had been enjoyed by his predeceſſors as belonging to the office. This was held ſufficient proof of the title of the voter.

Contract before election: conveyance delayed till after by default of vendee: vendor may vote.

31ſt May. Edward Simpſon. Objection, "No freehold." It was propoſed to ſhew that the voter had parted with his eſtate before he voted. His vote was given 29th July, 1802. On the 22d of June preceding, he had ſold the eſtate by auction to one Linton, who paid a depoſit of 39*l. per cent.* at the time of the ſale. The voter, at the ſame time, agreed to clear up all outgoings to the 24th June, 1802, and to make a conveyance on the 12th of July then next, upon the deed being prepared by the vendee, and upon payment of the reſt of the purchaſe money. It appeared however that in point of fact, the deed of conveyance, not having been prepared till the 30th of July, was executed on that day, and the poſſeſſion of the premiſes delivered to the vendee at the ſame time. It was likewiſe proved, that the voter continued to occupy a houſe (parcel of the premiſes ſold) at the time of the election; that he had quitted it in the October following; and that he had paid rent for it to Linton from Midſummer to Chriſtmas 1802.

Argument againſt the vote.

Againſt the vote, it was ſaid, that the vendee had an equitable title to the eſtate at the time the vote was given; that he might have claimed a ſpecific performance of the

[m] See 1 Atk. 622. 2, 71. 3, 273. Glouceſterſh. p. 129. 1 Heyw. 62—63. Simeon, 84. But ſee 2 Lud. 540. Glouceſter, 163. And ſee W. Parry's vote, Glouceſter, 82. where the voter, who had articled to ſell his eſtate and had put the vendee in poſſeſſion before the election, was allowed to vote, the conveyance not having been executed, nor the purchaſe-money paid. But ſee 2 Lud. 427. Where there was a deviſe to A. B. to ſell, and pay legacies, and the legatee (the voter) took poſſeſſion of the land in ſatisfaction of the legacy, the vote was held good. 2 Lud. 424. So where the deviſee of an annuity charged on land, took the land by parole agreement in ſatisfaction of the annuity, the vote was held good. 2 Lud. 440.

agreement

agreement on the 12th of July, on which day the conveyance was ſtipulated to be made; and that he himſelf had a ſufficient title to have given him a right to vote, had it not accrued to him within a year of the election. He was in poſſeſſion of the rents and profits of the eſtate from Midſummer 1802. Mr. Serjt. Heywood ſays, "In truth the queſtion in this and other caſes ſeems to be, who is to have the rents and profits of the eſtate, by virtue of the agreement, until the legal conveyance is made? for if they belong to the vendee, under ſuch circumſtances, as that he can compel a ſpecific performance, the vendor is the truſtee of the legal eſtate for him; but, on the contrary, if they belong to the vendor, though the vendee is in poſſeſſion of the premiſes, he clearly is entitled to vote, by the 7 & 8 W. 3. c. 25."

Argument for the vote.

On the other ſide, the principle laid down in the paſſage cited, was not denied, except in as far as the application to a court of equity for a ſpecific performance was ſuppoſed to proceed on the principle of the ſeller being a truſtee for the buyer: whereas, it was ſaid, that ſuch an application proceeded upon a contrary principle, *viz.* that the ſeller refuſed to complete his contract, and retained the eſtate to himſelf. But here, the queſtion of ſpecific performance did not occur: ſince the conveyance was made to depend upon two acts to be done by the vendee; namely, the payment of the remainder of the purchaſe money, and preparing the deed; till he performed both theſe things, the eſtate remained in the vendor; and had they never been performed at all, the eſtate could never have been diveſted from him. With reſpect to the receipt of the rent from Midſummer to Chriſtmas 1802, as it was not payable till it became due, he who was in poſſeſſion of the eſtate at the time it became due, was entitled to it[n]: alſo, it might be a matter of contract that the vendee ſhould receive the rent from Midſummer;

[n] Becauſe the rent is not due till the laſt day. If the leſſor die before the day, the rent goes to the heir, not to the executor. See Com. Dig. Rent, B. 9. Yet the leſſor would be ſaid to be in the receipt of the *rents* and *profits* to the time of his death. So, if the tenant for life die before the day, the rent goes to the remainder man. Salk. 578. 1 Saund. 287. See 2 Lud. 540.

which

which would not however affect the legal intereſts of the parties with reſpect to the eſtate itſelf. The committee determined the vote to be good [o].

Conveyance held neceſſary to be produced, in proof of title.

18th June. John Pringle. The name of the Duke of Portland appearing upon the aſſeſſment as proprietor, it became neceſſary in ſupport of the vote, to ſhew a title in the voter derived from the Duke. It was proved, that he had made an agreement with the Duke's ſteward for the purchaſe of the eſtate in 1799, and had been let into poſſeſſion of it at that time; but no deed of conveyance was produced, and it was proved, that the voter had been ſerved with a notice to produce his deeds. It was inſiſted, that it was neceſſary the conveyance ſhould be produced, and that the committee had always required the production of the conveyance itſelf, when it could be procured, as the higheſt proof of the title. See *ante*, p. 68. It was anſwered, that ſuppoſing no conveyance had been executed in this caſe, yet the voter had in equity, a freehold intereſt in the eſtate by virtue of his poſſeſſion under the contract, and that a court of equity would at any time compel a conveyance to be executed to him. The committee determined the vote to be bad.

Being partner in trade, not ſufficient proof of a freehold intereſt in premiſes belonging to the partnerſhip.

25th June. Henry Smith. The land-tax of the premiſes for which he voted had been redeemed. In the contract of redemption Meſſrs. Dent and Keyſall were ſtated to be proprietors; Meſſrs. Child and Co. occupiers. It was neceſſary to prove the title of the voter. For this purpoſe evidence was given of the voter acting as a partner in the houſe of Child and Co. The committee did not think this ſufficient proof of his having a freehold intereſt as joint-tenant in the premiſes, and determined the vote to be bad.

Freehold tenant under the ſociety of Lincoln's Inn.

16th May. Arthur Anſtey voted for chambers in the Old Buildings, Lincoln's Inn, in his own occupation. He was objected to for want of freehold. The nature of his title was as follows: William Earl of Mansfield, in 1786, conveyed certain premiſes, including thoſe for which the vote was given, to 24 perſons (the benchers of Lincoln's Inn at that time) and to their heirs and aſſigns for ever, in

[o] See W. Parry's caſe, Glouceſter, 82. cited *ante*, p. 107.

truſt

truſt to and for the only benefit of the ſociety of Lincoln's Inn. The voter, in 1796, obtained a life intereſt in the premiſes for which he voted, in the following manner; upon the petition of Robert Capper, February 20, 1796, to the benchers, or council, an order was made, dated 26th February in the ſame year, for the admiſſion of Mr. Anſtey to the premiſes for life, on the ſurrender of Mr. Capper, and upon payment by each of them of the dues then owing to the ſociety, and by Mr. A. of the uſual fine. The words "Be it ſo" were written upon the petition, by one of the benchers; and the above-mentioned order was entered on the books of the ſociety, but was neither ſigned by any of the benchers, nor ſtamped; a piece of parchment was delivered to the voter, unſtamped, ſigned by the treaſurer (who is a bencher) and the ſteward, containing the ſubſtance of the order. This is the form, by which chambers held of the ſociety have been transferred for the laſt 300 years. The tenant for his own life muſt be a member of the ſociety, and at the time of his admiſſion as a member he gives a bond for the obſervance of all its rules; he cannot transfer or ſurrender his chambers to another for the life of the ſurrenderee, without the permiſſion of the ſociety, and payment of a fine; but he may diſpoſe of his own intereſt in them, without ſuch permiſſion or payment; or he may let them for a year, or more; but the occupier ought, by rule, to be a member of the ſociety. There are certain annual dues payable by the tenant for life, of a higher amount than thoſe payable by other members of the ſociety who hold no chambers. The tenant has the entire control over the interior of the chambers; but he may not make any alteration in the outer walls, or roof, without permiſſion from the ſociety, by whom the outward building is kept in repair. At the council at which the above-mentioned order for the admiſſion of Mr. Anſtey was made, 12 benchers were preſent, 9 of whom were feoffees originally named in the conveyance from Lord Mansfield. The reſt were then alive, but were not preſent. The benchers aſſemble in council for the purpoſe of tranſacting buſineſs; in general, five muſt be preſent to form a council; but for the purpoſes of a call

to

to the bar, or the transfer of chambers, the preſence of three only is required.

The following objections were made to the title of this voter. Firſt, the eſtate never paſſed to him, ſince all the feoffees in truſt did not join in the conveyance. Secondly, there is no legal deed of conveyance of the eſtate, either ſigned, ſealed, or duly ſtamped. The admiſſion is more in the nature of a transfer of copyhold, than of freehold eſtate. The title given by the benchers is ſuch as would not be available againſt them in a court of law. The courts of law, indeed, have no juriſdiction over the Inns of court[p]. They are ſocieties of a very peculiar, and anomalous nature; law univerſities, ſubject to the control of the chancellor and 12 judges, who are the viſitors, and have a domeſtic juriſdiction there. They voluntarily ſubmit themſelves to certain conſtitutions and laws, by which each member of the ſociety is bound; not only by ſuch as are already framed before his admiſſion, but by ſuch alſo as the governing body may thereafter make; and inſtances occur in Dugdale's *Origines Juridiciales* of reſtrictions in point of dreſs, and of expulſion being made the penalty for diſobeying them: but an eſtate, defeaſible by conditions hereafter to be impoſed according to the will of the grantor, cannot be termed a freehold eſtate. It is, in fact, held at the grantor's will. Thirdly, neither is it an equitable eſtate. If the entry and admiſſion ſhould be inſiſted upon as an agreement for a transfer of the title, it is anſwered, 1. That the agreement not being ſtamped, could not be brought into a court of equity.—2. That the nature of the property is equally exempt from the juriſdiction of a court of equity, as of a court of law: as it was held in the caſe of Rakeſtraw and others *v.* Brewer, 2 Peere Williams, 512. —— Brown's caſes in Chancery, Cunningham *v.* the Benchers of Gray's Inn. That cannot be an equitable eſtate, which cannot be made the foundation of a ſuit in equity. Neither can the admiſſion be conſidered as a declaration of truſt; for it is not ſigned by the

Argument againſt the vote.

[p] See Douglas's Reports in K. B. Gray's Inn. 1 Bl. Com. 23. 25. 353. The King *v.* The Benchers of

party

party who is by law entitled to declare ſuch truſts, as is required by ſt. 29 Car 2. c. 3. ſ. 7.

Argument in ſupport of the vote.

Theſe arguments were anſwered by the following. It appears that this mode of conveyance has been in uſe for three centuries. For ſo long a time, it has been the practice for a ſmall number of the benchers to act for the whole; the committee will not hold all the acts done by them to be null and void, but will rather infer an authority legally delegated from the whole body to the ſmaller number. It is clear that the ſociety of Lincoln's Inn is not a corporation; ſo that the objection made againſt this voter is not ſuch as has heretofore been made againſt members of colleges [q], whoſe intereſt is a permiſſive occupation, and who have neither an individual property, nor a right to transfer. This is a voluntary ſociety of perſons, who conform themſelves to certain rules, and who, whether by charter, or long uſage, have excluded from themſelves the ordinary juriſdiction of the courts of law, ſubmitting themſelves to another juriſdiction, or arbitration, of a private and domeſtic nature. By formal admiſſion, and for a valuable conſideration, they have granted out a life intereſt to the voter, who is in the enjoyment of the eſtate, and may diſpoſe of it as he pleaſes. This grant is good againſt themſelves, and there is no other title, by which the eſtate of the voter can be affected. It is an equitable title; and the admiſſion is of the nature of a declaration of truſt, which need not be ſtamped. The conveyance is in a form peculiar to themſelves, but hitherto found ſufficient to ſecure the eſtate to the grantee. The regulations which are impoſed, or which may be hereafter impoſed, are conditions, which the grantee has bound himſelf to obſerve. They are charges upon the eſtate, but do not affect the intereſt of the owner, any more than any other conditions, which may be impoſed on other eſtates, held, as theſe are, *ſub modo*. It is a freehold, as long as the condition remains unbroken. Neither has it in this caſe been diſtinctly proved, that there are any regulations now ſubſiſting, the breach of which, would be followed by the

[q] Glouceſterſhire caſe, p. 136.

for-

forfeiture of the eſtate. The ſtatutes of aſſeſſment, 12 Ann. c. 5. and 18 G. 2. c. 18. exempt perſons who vote "in reſpect of any chambers in the inns of court and inns of chancery[r]." From this it appears that a freehold intereſt in ſuch chambers was conſidered to confer a right to vote. The committee determined that Arthur Anſtey was a good vote.

Enjoyment in ſeveralty of an eſtate veſted in a corporation aggregate.

16th June. Rev. W. Bell. Objections, "no freehold, and not duly aſſeſſed to the land-tax." The voter was a prebendary of the cathedral church of Weſtminſter, and voted for his prebendal houſe. The Dean and Chapter were made a body corporate by charter, 21ſt May, 2 Eliz. The prebendaries chuſe their houſes by ſeniority, and if they do not live in them, they may let them. They enjoy the profits of all their other eſtates jointly. The houſes are repaired from the common fund.

With reſpect to aſſeſſment, this houſe was contended to fall within ſt. 38 G. 3. c. 5. ſ. 25. which makes an exception in favour of colleges and halls in Oxford or Cambridge, Winton, Eton, or Weſtminſter, or the college of Bromley, for the ſites of their buildings, or the maſters of public ſchools, or any hoſpitals for their revenues, &c. The vote was principally objected to upon the principle of the meſſuage being the eſtate of the corporation, enjoyed in ſeveralty by the owners, according to an agreement among themſelves[s]. The committee held the vote to be bad.

Rev. John Wingfield, ſecond Maſter of Weſtminſter ſchool. He is appointed by the Dean and Chapter; and upon his appointment becomes a member of the corporation. He receives a ſtipend, and is alſo entitled to a houſe in Weſtminſter, part of the corporate eſtates, by virtue of his office, which is for life. The vote was determined to be bad.

Title deeds required to be produced in proof of title.

The committee, in all caſes where it was neceſſary to prove the title of the voter, required the production of his

[r] This exemption is omitted in ſtat. 30 G. 3. c. 17.

[s] The Glouceſterſhire committee reſolved, p. 136. "that the voter, being part of a corporate body, compriſed of a cuſtos and eleven vicars of Hereford, had not a right to vote at the laſt election for the county of Glouceſter, for his part of the eſtate veſted in the ſaid corporation.

title-deeds. But on account of the great trouble and ex which would have been occaſioned by bringing up th ſcribing witneſſes to thoſe deeds, an agreement took for the mutual convenience of both parties, that they be admitted in evidence without proof by the ſubſc witneſſes.

Certificate of marriage.

It may here likewiſe be mentioned, although perha ſtrictly falling under the preſent head, that in proof o riage, they required the production of an atteſted co the regiſter[t]. In the caſe of wills, they admitted the

Probate of wills.

bates in evidence[u], in conſequence of an agreement be the parties that ſuch ſhould be admitted: but an exc was made of caſes where there might appear a doubt the validity of the will.

Where a conveyance is referred to.

29th March. Tims Kight. Where it appeared had been a deed of conveyance to the voter of a ſha public company, the entry of the voter's name in the di book, and regiſter of the conveyance in the books company of which he was a ſharer, was held not to ſufficient proof of his title to the ſhare for which he without the actual production of the conveyance.

5. No caſe occurred of ſufficient importance to be rep of the voter's having an intereſt leſs than freehold eſtate. See *ante*, p. 91, 92.

[t] It would have been highly improper for the reporter to have omitted the two preceding rules of the committee, ſince they are of ſo much importance: it muſt be confeſſed, however, that, as general rules, they are liable to ſtrong legal objections; ſince no maxims are more clear, than, that poſſeſſion is *primâ facie* evidence of a freehold, and reputation (in general) of marriage. The reader will remember, that it was required of the party ſupporting the vote to ſhew the voter's title, where a different proprietor appeared upon ſeſſment; (*ante*, p. 68.) or, w exemption was claimed from aſſ on the ſcore of office, (*ante*, p.

[u] The ſame agreement was the caſe of Glouceſterſhire, p. 1 The Houſe of Commons, in the Oxfordſhire, 1755, (27 Journ. ſolved to receive the probate of to diſprove the voter's title. T ferred to the caſes of Great 17 Jan. 1744, and Wendover, 1735.

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Queſtions relating to the eſtate of the voter: ariſing, 6. From the time of his poſſeſſion of it.

18th June. Samuel Owen. On the aſſeſſment, the name of the Duke of Portland appeared as the proprietor. To derive the title from the Duke to S. O. a conveyance was produced dated June 1802, with an indorſement of the ſame date, by which the receipt of 650*l.* the purchaſe money, was acknowledged. It was proved, that the agreement for the ſale of the eſtate was made long before the election; and that according to the terms of that agreement, the voter was to be let into poſſeſſion, when the purchaſe money was paid; and that in fact the money had been paid a conſiderable time before the election. The witneſs was unable to ſpeak to the preciſe time, but he was ſure that the Duke had ceaſed to receive the rents in 1799. It was obſerved in ſupport of the vote, that nothing was more common than to acknowledge the receipt of the conſideration-money on the back of the conveyance, as of the ſame day as the date of the deed, although in fact it might have been paid long before. The vote was allowed [w].

The acknowledgment of the receipt of the purchaſe-money not evidence of the time of the voter's poſſeſſion.

This queſtion upon the year's poſſeſſion was not ſpecifically made againſt the voter, but aroſe from the date of the conveyance put in to prove his title, and to account for the variance between the aſſeſſment and the poll, as to the name of the proprietor. See *ſuprà* p. 68.

Rev. G. Bailey. It was admitted that a perſon married during the election had a right to vote at the ſame election, for premiſes to which he became entitled by the marriage [x]. See ſt. 18 G. 2. c. 18. ſ. 5.

Marriage during the election.

[w] Where the voter for the firſt time contracted for his freehold within a year before the election, and received the rent due from the Lady-day preceding, which was more than a year; the Bedfordſhire committee diſallowed the vote. 2 Lud. 540. The Bedfordſhire committee allowed the vote, where the voter had been long in poſſeſſion, though ſome of the conſideration-money had been paid within the year. 2 Lud. 540.

[x] The ſame point was decided by the Bedfordſhire committee, in the caſe of Robert Saunders, 2 Lud. 427.

VI. Queſtions relating to the perſon of the voter: in reſpect, 1. of office.

Collector of duty on windows, &c.

2d June. Joſeph Jollands. He was objected to as being a collector of the duty on windows and houſes, and as ſuch diſqualified by the ſt. 22 G. 3. c. 41 [y]. Upon reading the ſtatute, little reſiſtance was made to the objection by the counſel on the other ſide, and the vote was admitted to be bad. But in the caſe of Edward Staples, (5th June) againſt whom the ſame objection was made, and who appeared to have been appointed by the commiſſioners of the land-tax, at the ſame time with the preceding voter, the counſel in ſupport of the vote having had a further opportunity to conſider the ſtatute, contended that he was protected by the ſecond ſection of the ſtatute [z], and cited the caſe of Thomas Barringer, 2 Lud. 551. where it was held, that a collector of the duties on windows and houſes, appointed by the commiſſioners of the land-tax, was not diſqualified. The arguments made uſe of on each ſide, were the ſame as thoſe reported in Barringer's caſe, and therefore are not repeated here. The committee decided that the vote was good; but refuſed to reſtore the vote of Jollands to the poll [a].

Queſtions

[y] Sect. 1. forbids certain perſons to vote at elections, among whom are "any ſurveyor, collector, comptroller, inſpector, officer, or other perſon employed in collecting, managing, or receiving the duties on windows or houſes."

[z] Sect. 2. contains a proviſo that the act ſhall not extend to commiſſioners of the land-tax, or perſons acting under the appointment of ſuch commiſſioners "for the purpoſe of aſſeſſing, levying, collecting, receiving, or managing the land-tax, *or any other* rates or duties already granted or impoſed, or which ſhall hereafter be granted or impoſed by authority of parliament." By ſt. 20 G. 2. c. 3. and 38 G. 3. c. 40. the management of the duties of windows and houſes is placed under the control of the commiſſioners of the land-tax, who are to appoint the collectors.

[a] The Bedfordſhire committee negatived the following motion; "That any collectors or aſſeſſors, appointed by or acting under the commiſſioners of the land tax, whether acting as ſuch, or as commiſſioners for the management of the duties on houſes and windows, or for the management of any other rates or duties impoſed or to be impoſed by parliament, are diſqualified from voting at elections of members to ſerve in parliament."

ons relating to the perſon of the voter: in reſpect,
2. of the receipt of alms.

1 April. Philip Harriſon. In the aſſeſſment, the was, "Philip Harriſon, poor." The voter was a ɔourer, and had for ſeveral years been the owner of ıall freehold cottages. The land-tax had never been ed from him. His vote was allowed [b]. Payment of land tax excuſed.

ons relating to the perſon of the voter: in reſpect,
3. of being an alien.

1 April. P. Eleazar Solomons, was objected to as ı foreigner. The evidence to ſupport this objection e teſtimony of a witneſs, who ſwore he had obtained of denization for the voter in the year 1797. It was oved that the eſtate, for which he had voted, had ɔnveyed to truſtees for his uſe before the obtaining of etters. It was admitted that a denizen might vote, was contended, that in this caſe, it appeared that he ı alien when he took his freehold, and that therefore :r legally veſted in him; that as in theſe circum-ı, he was incapable of taking a freehold in land to f, he could not take it by a truſtee, but that the title the king. See 1 Heyw. 157. But it was anſwered, e clear law was, that the king was entitled only upon ound, and that the alien holds his eſtate ſubject to A denizen may vote for a freehold acquired before denization.

[b] 2 Lud. 551. It is alſo ſaid, ıilar objection was over-rul d Buckinghamſhire committee. cipal arguments uſed, in the ıire caſe, in ſupport of the vote, ıt the firſt ſection of the ſa- emplated officers of a higher n, and not ſuch collectors as oſe appointmen was not by the ; was compulſive; of very lument; and was a duty they refuſe, or reſign.

ı reſolution might have pro- ɔn the ground that the aſſeſſ- ıs not evidence to ſupport the objection: or, that the excuſe of the land-tax on the ground of poverty, is no diſqualification. It furniſhes, however, an authority to ſhew, that the mere aſſeſſment is ſufficient, and that payment of the rate is not neceſſary. The Bedfordſhire committee negatived a motion, "that pariſh alms paid to a freeholder do invalidate his vote, although he continues in poſſeſſion of a freehold of the clear yearly value of 40s." The Cricklade committee held them to be a diſqualification, if received within 12 months before the election. 2 Lud. 564. 567.

be deveſted of it by the office found: but that inaſmuch as he had been made a denizen, and capable of holding lands, before any inquiſition was ſued out for the crown, the freehold was in him abſolutely and indefeaſibly [c]. The committee decided the vote to be good.

Evidence of being an alien.

28th May. Anthony Barbre. Objection, "Alien." The chief clerk of the Alien Office produced the returns made by the aliens at the different police offices, under the alien act. Therein appeared a declaration ſigned by the voter, 31ſt July 1798, that he was born at Paris, &c. A book was alſo produced by the ſame witneſs, containing a memorandum of a licence granted to him purſuant to the ſame ſtatute. This was admitted to be ſufficient evidence of his being at that time a foreigner; and no proof being given that he had ſince been naturalized, his vote was declared bad.

VII. Queſtions relating to evidence.

1. Who is permitted to be a witneſs, or to produce written evidence.

A truſtee not permitted to produce a deed without the conſent of the *ceſtui que truſt*.

26th May. Joſeph Lifford. Objection, "no freehold." To impeach his title a perſon was called, to whom he was ſaid to have conveyed his eſtate in truſt for the benefit of his wife, on a ſeparation taking place between them. The witneſs was the truſtee, and was called upon to produce the deed of truſt, and to give evidence of the contents of ſome other deeds, proved to have been burnt: and it was ſaid, that the wife's conſent to the production of the truſt-deed was not neceſſary. It was anſwered, that the rule, which the committee had acted upon, was, that he who had no intereſt in the deed, had no control over it; and that this principle extended to the preſent caſe. The committee reſolved, that a truſtee may not, without the conſent of the *ceſtui que truſt*, produce a deed, or give evidence of the contents of a deed that has been deſtroyed [d]. See *poſt*.

17th

[c] See Harg. and Butler's Co. Lit. 2. b. notes 3, 4, and 5.

[d] "A truſtee may be a witneſs againſt his truſt," by Hale, C. J. but Twyſden doubted thereof. Trials *per Pais*, 317. ch. 15. But Holt C. J. refuſed to admit a witneſs, becauſe it appeared, that he was privately entruſted by both parties

17th May. Henry Daviſon. Freehold, "Lincoln's Inn." Objections, "No freehold. Not duly aſſeſſed." To prove that he had no freehold, Thomas Lane, the ſteward of Lincoln's Inn was ſworn as a witneſs. He had been previouſly ſerved with the chairman's order to produce the books of the ſociety in his poſſeſſion. This order upon him was conſidered by the committee as an infringement of a rule laid down by them 17th April[e]. Two of the benchers of Lincoln's Inn had the day before attended, and informed the committee that Mr. Lane had no authority to produce any documents belonging to the ſociety, and that the order ought to have been ſerved upon the benchers. In conſequence of this, an order upon the benchers was drawn up, but the chairman refuſed to ſign it. A notice had alſo been ſerved on the benchers, on the part of the ſitting member, to produce the ſame documents, and another notice upon the voter, to produce his title deeds. On the day before, theſe books had been produced by Mr. Lane, by the deſire of the counſel who appeared in ſupport of the titles of the voters objected to; and this day, he produced an order from the ſociety, in which he was directed to produce the documents, &c. *only* in *ſupport* of the titles of the voters. He ſaid he had no authority from the voter himſelf to produce any thing relating to his title. The counſel for the ſitting member then inſiſted on a right to examine Mr. Lane as to the contents of theſe documents, ſince the voter had failed to produce his original title deeds, after notice. The counſel for the petitioner objected *in toto* to any evidence Mr.

Steward of Lincoln's Inn not permitted to produce documents of that ſociety, to impeach the title of voters claiming under them.

parties to make the bargain, and to keep it ſecret. "And (by him) a truſtee ſhall not be a witneſs, in order to betray the truſt." 1 Ld. Raym. 733. B. N. P. p. 284. In an action againſt a bankrupt, the plaintiff, to prove the certificate fraudulently obtained, ſubpœnaed the ſolicitor under the commiſſion, with a *duces tecum* of the proceedings. Lord Kenyon held, that he was not only not bound to produce them, but that it would be criminal in him to do it: they were not his papers, but thoſe of his clients, the aſſignees of the bankrupt's eſtate. Bateſon *v.* Hartſinck, 4 Eſp. Reports, 43. He added, that it would be a moſt dangerous doctrine, to hold, that if one man's title-deeds were accidentally in the hands of another, he might be called upon to ſhew them by any man who came with a *ſubpœna duces tecum*; that if ſuch were the law, no purchaſer for a valuable conſideration would be ſafe. MS.

[e] See *poſt*, of compelling the production of evidence.

Lane might give to impeach the title of the voter. They ſaid, that he who is in poſſeſſion of title deeds, as agent, or truſtee for the perſon intereſted, is not at liberty to produce them, without the conſent of that perſon: that the ſame rule extends to copies of deeds, and alſo to parole evidence of their contents; otherwiſe it would be entirely nugatory: that Lane was the agent, and the ſteward, both of the ſociety, as a body, and of the individual voters, or tenants; had the benchers given him authority to produce theſe books in evidence againſt their tenants, ſtill he would not have been at liberty to do ſo, without the permiſſion of the tenants themſelves; that, on the other hand, in defence of their titles, they had a right to the uſe of them; and if the bench had denied them the inſpection and uſe of them, the courts of law would have compelled them to grant it; that the ſame rule of law held with reſpect to lords of manors, corporations, &c. who, where they are by particular circumſtances conſtituted the *cuſtodes* of the muniments of private titles, are obliged to produce them in ſupport of the titles, but are not at liberty to do ſo, to impeach them at the requiſition of a ſtranger. The counſel impeaching the vote, however, perſiſted in requiring of Mr. Lane to turn to the admiſſion of Mr. Daviſon, in the books of the ſociety; but the committee would not permit it to be done. The objection of non-aſſeſſment was then reſorted to, and it appeared that the Hon. Booth Grey was aſſeſſed as proprietor in 1801. This making it neceſſary for the title of the voter to be proved, and to be deduced from Mr. Grey, the book was produced at the deſire of the counſel for the petitioner, who ſupported the vote: and the admiſſion of Mr. D. appeared to have been 12th February, 1802. No other evidence b ing given of an antecedent contract, or poſſeſſion, the vote was declared bad.

Steward of a manor called to produce the court-rolls.

23d May. Henry Pratt. Mr. Thomas Tibbutt, the ſteward of the manor of Hackney, was called as a witneſs on the part of the ſitting member, (who objected to the vote) and required to produce the court-rolls of the manor, to prove that the eſtate, in reſpect of which the vote had been given, was copyhold. He ſaid, upon being queſtioned,

that he had no particular authority either from the lord of the manor, or from the voter, to produce the entry on the rolls relating to this property : that he had been authorized generally, on the part of the lord of the manor, to do, at all times, any thing which he conſidered to be for the good of the manor. He alſo ſaid, that he had no objection to produce the rolls. The production of them was objected to on the part of the petitioner, ſince neither the conſent of the lord of the manor, nor of the voter, had been obtained thereto. It was anſwered on the part of the ſitting member, that the committee would not exclude the beſt, and the only evidence, by which the objection to the vote could be eſtabliſhed : that the conſent of the tenant was not neceſſary ; ſince his diſſent, for the purpoſe of concealing the defect of his own vote, ought not to prevent its production : and that the diſſent of the lord of the manor ſhould be expreſsly proved ; whereas here, it did not appear either that the lord or the tenant had any objection to the rolls being produced. Although the court-rolls of a manor are in ſome reſpects the muniments of private titles, yet they are in their nature public documents, and acceſſible by all who have an intereſt in their contents ; and the ſitting member has, in this inſtance, an intereſt, to ſhew from them that the voter's eſtate is copyhold, and not freehold. It cannot be contended, that if the lord had given his conſent, the conſent of the tenant is material ; for if ſo, no perſon out of poſſeſſion, who claims a copyhold eſtate, can ever prove his title in a court of juſtice. An heir at law who has been admitted, might prevent another who claims as deviſee, from ſhewing the admiſſion of the deviſor, or his ſurrender to the uſe of his will, which would be neceſſary proof in ſupport of his claim. The court-rolls are the entries of proceedings in a court of juſtice ; to which all perſons may have acceſs : it is for that reaſon, that copies of them are evidence. See Gilbert's Law of Evidence. p. 74. (Edit. 1777.) " Of the public matters that are not records. The rolls of the court baron, or the copies of them, for they are courts of juſtice, though they are not of record. The court-rolls are evidence, or the copies of them ; for they are the public rolls,

Objection to the evidence.

Argument in ſupport of it.

rolls, by which the inheritance of every tenant is preſerved, and they are the rolls of the manor court, which was anciently a court of juſtice, relating to all property within the diſtrict." Laſtly, the committee have a right, in execution of the power given them by the houſe "to ſend for all perſons, papers, or records," to require the production of theſe documents, for the purpoſe of detecting a fraud, and of advancing the juſtice of the caſe: and although it may be admitted that this authority ought not to be exerciſed to ſuch an extent as to force from the cuſtody of any individual the muniments of his private title, yet it may fairly be employed to compel the lord of a manor, or his ſteward, to produce the proceedings of his own courts, which are of a more public nature. Such an authority is commonly exerciſed by the ordinary courts of juſtice. It is alſo to be conſidered, that in this caſe, the object of the evidence is not to deveſt the voter's eſtate, or to affect his title to it; but only to ſhew that he enjoys it by a different title, from what he has repreſented at the poll.

Power of the committee under the order of the Houſe.

The counſel for the petitioner, in reply. It is admitted that if a court of juſtice would allow the court-rolls to be produced in ſuch circumſtances, this committee will do ſo likewiſe: but it is denied that they are ſuch public documents into which every one has a right to ſearch; and it is alſo denied, that the ſitting member has any ſuch intereſt as will entitle him to the inſpection of them. So far as they contain the titles of ſeveral perſons, they may be called, in ſome ſenſe, public books; but inaſmuch as they reſpect the title of an individual, they are as private as any other title-deeds, and as much ſubject to the control of that individual. The paſſage cited from Ch. B. Gilbert is not to be underſtood as applying to queſtions of private title, but to judicial proceedings in the court-baron; for with reſpect to private titles, the law has been frequently determined to be otherwiſe. In the caſe of Talbot *v.* Villeboys, M. 23 G. 3 [f]. the court of King's Bench, in a queſtion whether certain lands were part of the manor of the plaintiff, or of the defendant, refuſed the defendant a rule to inſpect the court-books of the

Argument againſt the evidence being produced.

[f] Cited by Buller, J. 3 Term Rep. 142.

plaintiff.

plaintiff. In the caſe of Smith *v.* Davies, 1 Wilſ. 104. where the lord of the manor claimed certain lands as copyhold, which the defendant aſſerted to be freehold, the court refuſed to grant to the defendant a ſimilar rule, becauſe "the plaintiff was not obliged to aſſiſt the defendant in making out his title." And in the caſe of the Biſhop of Hereford *v.* the Duke of Bridgewater, Bunb. 269. where a bill had been filed againſt the defendant and others for tithes, an inſpection of the court-rolls of his manor, to ſee in what proportions a certain modus had been paid, was denied to the plaintiff. Neither if the lord had given his conſent, would the production of the court-rolls, without the conſent of the tenant, be allowable. In the caſe ſuppoſed by the counſel on the other ſide, the deviſee of the copyhold would derive his title through the admiſſion of a former tenant, and upon that ground, he would have an intereſt in the court-rolls. But here the production is demanded by a mere ſtranger, who claims nothing in the manor, either as lord, or as tenant, or through a tenant.

The committee determined that the conſent of the lord of the manor muſt be proved, before the court-rolls were produced [s].

Deciſion. Steward may not produce the rolls without the conſent of the lord.

24th May. Same vote. The queſtion was again diſcuſſed, and the committee determined, that as Mr. Tibbutt had declared that he conſidered himſelf authorized by the lord of the manor to make any uſe he pleaſed of the court-rolls, conſiſtently with his duty as a ſteward, he was at liberty to produce them or not, as he pleaſed. Mr. Tibbutt refuſed to produce them.

He was then aſked by the counſel impeaching the vote, whether he did not know, in point of fact, that the name of the voter appeared on the rolls, as having been admitted to the premiſes for which he had voted? The witneſs expreſſed his wiſh not to give any account of the contents of the rolls: and the committee determined that the queſtion ſhould not be put.

Need not give evidence of their contents.

[s] They at firſt determined, that the conſent both of the lord, and alſo of the tenant, was neceſſary: but on the following day, they reſcinded ſo much of the reſolution, as related to the tenant.

Upon

Copy of admiſſion procured from the voter, given in evidence.

Upon this, a witneſs was called, who ſaid that he had viſited the voter on the preceding evening, and had aſked him, on the part of the ſitting member (who objected to the vote) for the title-deeds of the eſtate for which he had voted; telling him, at the ſame time, that he was at liberty to withhold them, if he thought proper: that the voter without heſitation delivered to him the inſtrument produced by the witneſs. This inſtrument appeared to be an admiſſion to a copyhold eſtate; and the premiſes deſcribed therein agreeing with the deſcription of the voter's eſtate on the poll, and the petitioner not being prepared to ſhew that he had any freehold eſtate correſponding with that deſcription, the committee determined the vote to be bad.

The lord of the manor having forbidden the production of the court-rolls, the bailiff's accounts rejected.

24th May. William James French. Objection, "No freehold." It was propoſed to prove that the premiſes, for which he had voted, were copyhold. The ſteward of the manor being called as a witneſs, declared that he had the expreſs directions of the lord of the manor, not to produce the books of the manor [h]. A perſon was then ſworn, who offered to produce a book of account, from which certain rents due to the lord of the manor were computed and collected. The witneſs was the ſon of the bailiff of the manor, and had collected the rents, by the book, for many years. It was propoſed to ſhew that they were copyhold rents, and that the voter had paid them for the premiſes for which he had voted. It was contended on the part of the petitioner who ſupported the vote, that the witneſs ſhould not be ſuffered to produce this book; and that the prohibition given by the lord of the manor to his ſteward, muſt be held to extend to documents in the hands of his bailiff, who was an inferior officer. The committee decided that the book ſhould not be produced. The witneſs being further examined, ſaid that he had collected theſe rents from the voter: but the committee did not conſider this as ſufficient evidence of the premiſes for which he had voted being copyhold, ſince, (as was ſuggeſted by the petitioner's counſel) it did not appear but that they might be paid by freeholders who owed ſervices to the manor. The vote was declared to be good.

[h] See the preceding vote.

29th

29th May. James Driver. Objection, "No freehold." It was propoſed to prove that the premiſes for which he voted were copyhold. Mr. W. Langmore, the ſteward of the manor of Stepney, (in which the premiſes were ſituated) produced the copy of an admiſſion, ſigned by himſelf. He ſaid, he conſidered himſelf bound to give a copy of any admiſſion to any perſon who applied to him for it. He admitted, that he had received the direction of the lord of the manor not to ſuffer any perſon to inſpect the court-rolls. Mr. Tibbutt, the ſteward of the manor of Hackney, (being queſtioned upon the ſubject) informed the committee, that, with reſpect to the practice of giving ſuch copies to perſons who applied for them, he conſidered himſelf bound to give them, as a matter of courſe, even to ſtrangers, upon their application, and upon payment of the uſual fees; except where there might be good reaſon to believe that the application was made for ſome purpoſe hoſtile to the intereſts of the lord, or of a tenant. Upon Mr. Serj. Lens riſing to oppoſe the production of this evidence, it was ſuggeſted by the counſel for the ſitting member that the objection could be made by no other than by the lord of the manor; the committee having determined that his conſent only was material. The room was cleared; after ſome deliberation, the chairman informed the counſel, that the committee conſidered the firſt queſtion to be, whether any indifferent perſon had a right and legal claim to demand of the ſteward a copy of the court-rolls: that, if any body had a right to demand them, it would follow of courſe that any body might make uſe of them in evidence; but that the committee deſired to hear that point argued. The other queſtion, whether, in theſe particular circumſtances, the evidence propoſed was admiſſible, would remain to be diſcuſſed, if the firſt queſtion were decided in the negative.

A ſtranger not entitled to a copy of the court-rolls.

The counſel for the petitioner argued in the following manner againſt the production of the evidence:

The conſideration of the nature of the property now under conſideration, furniſhes a ſufficient anſwer to the queſtion; it is private property, and the court-rolls being the muniments of the title to it, all ſuch perſons as are intereſted

Argument againſt the production of the evidence.

tereſted in the title, and no others, have a right to them. It follows alſo from the nature of the property, that they muſt be depoſited with one perſon for the uſe of all. The lord has in him, as a depoſit, the rights of all the tenants. The freehold is in him; but he is conſtrained by the law to preſerve the rights of his tenants, and to aſſiſt them in maintaining thoſe rights, according as the cuſtom of the manor prevails, by which his will is limited and controlled. Being the depoſitory of the rights of his tenants, he is alſo the depoſitory of the muniments of thoſe rights, namely, the court-rolls. The caſes cited in the argument upon Pratt's vote [i], prove that theſe are not public rights, nor are the rolls, as public records, open to the inſpection of every one. To theſe caſes may be added thoſe of Crew *v.* Saunders, 2 Str. 1005. where it is ſaid, "Inſpecting court-rolls was the original of theſe motions" (for inſpection); "but then it was confined to the caſe of perſons intereſted, the rolls being the common evidence, which of neceſſity muſt be kept in ſome one hand." And in the caſe of the King *v.* Allgood, 7 Term Rep. 746. a freehold tenant of the manor having applied for an inſpection and copies of the court-rolls, ſtating only, that he was ſuch tenant and had occaſion to inſpect them, the court expreſſed themſelves of opinion, that "unleſs ſome cauſe were depending, (*i. e.* where he was concerned,) the tenant had no right to call for an inſpection of the court-rolls." It need not be contended, that whatever duty lies upon the lord to preſerve the titles of his tenants, and to prevent the inſpection of them by improper perſons, the ſame duty lies upon his ſteward [k].

Argument for the production of the evidence.

Argument for the ſitting member. This is not a queſtion of inſpection, which implies a general ſearch through the records, for whatever may be found there of uſe to the perſon who has obtained the order for that purpoſe. Even if that were the queſtion, the caſe of Liſkeard [l] in the preſent ſeſſion ſhews that the Houſe of Commons does not con-

[i] *Ante*, p. 122, 123.

[k] See the caſes upon the ſubject of inſpection granted by courts of law, very ably arranged by Mr. Nolan, in his Note to the caſe of The King *v.* The Fraternity of Hoſtmen in Newcaſtle-upon-Tyne, 2 Str. 1223.

[l] Reported, *poſt*.

ſider

ſider itſelf bound by the rules which prevail as to this ſubject in the courts of law. The Speaker, at the inſtance of Mr. T. Sheridan, granted a general order for the inſpection of all the papers, and records of that borough; and his agents, by virtue of that order, ſpent three months in ſearching for evidence. The granting, or denial of inſpections by other courts, ſeems to have been frequently a matter of diſcretion. In the caſe of the Mayor of Lynn *v.* Denton, 1 Term Rep. 689. which was an action for tolls, the defendant claimed an exemption as freeman of London; and the court granted him an inſpection of the books of the corporation of Lynn without ſuffering the matter to be diſcuſſed, ſaying, that it had been the general practice for many years, to grant ſuch applications. But the queſtion here, is, whether or not, the particular document being ſpecified, the parties have not a right to a copy of it. It has been ſaid, that they are private documents; ſo are wills; but they being depoſited in the public court, any perſon at his pleaſure may inſpect or have a copy of them. So alſo, deeds that are regiſtered in the county of Middleſex, under the ſt. 7 Ann. c. 20. are private muniments; but any perſon may inſpect or copy them, and it is remarkable, that conveyances of copyhold eſtates are exempted by ſ. 17. from the neceſſity of being regiſtered; which ſtrongly ſhews that the legiſlature conſidered them without regiſtration to be already as public, as other deeds were about to be made by the proviſions of the ſtatute. In ſome of the caſes cited by the ſitting member, the party applied for a general inſpection; in others the evidence was to be made uſe of againſt the rights of the lord of the manor himſelf; theſe caſes therefore are very unlike the preſent. Neither indeed does it follow if the lord were not bound to grant an inſpection, that the ſteward is not bound to produce the admiſſion, for in the caſe of the King *v.* Dr. Purnell, 1 Bl. Rep. p. 37. the court refuſed a rule upon the Vice chancellor of Oxford, for an inſpection of the public books of the univerſity, but admitted that the *Cuſtos Archivorum* might have been compelled to produce his books[m].

[m] See the caſes collected in Com. Dig. Evidence, C. 2.

The

Reply. The counſel for the petitioner in reply. The authority of the caſe of the Mayor of Lynn *v.* Denton began to be doubted very ſoon after the deciſion of it; ſee 3 Term Rep. 305. *in not.*: and in the caſe of the Mayor of Southampton *v.* Graves, 8 Term Rep. 590. it was expreſsly denied; and a ſimilar rule for an inſpection was refuſed. It is clear, that if the party is not entitled to a copy of the admiſſion, he has no right to make uſe of it as evidence; for if he has a right to it as evidence in any ſhape, he may compel him who has the cuſtody of it to produce it, or to give him a copy of it; and therefore, his having no right to the copy, ſhews, that he is not entitled to make uſe of it in evidence; and it is on this principle, that caſes of granting inſpection are in point to the preſent queſtion. In the caſe of The King *v.* Dr. Purnell, it was a queſtion upon the public duty of the Vice-chancellor, whoſe conduct was impeached; and the books might be more properly called public books. In the caſe of Liſkeard alſo, the queſtion was upon a public right, and not upon the title of any individuals; and there the inſpection was not at all reſiſted by the burgeſſes. The inſtance of the regiſtration of wills has been cited as analogous; but no precedent has been adverted to, where a will has been compelled to be produced; that they are made public (in the caſe of wills of perſonal property) depends upon the peculiar nature of the juriſdiction of the ordinary in ſuch matters. The ſt. 7 Ann. c. 20. does not require the deeds themſelves to be regiſtered, but only the names of the parties, and the dates, &c. by which prior incumbrances may be diſcovered, and frauds prevented; but the regiſter is not the depoſitory of the deeds themſelves, or of tranſcripts of them.

Deciſion. The commitee determined, that a ſtranger to the manor is not entitled to claim a copy of the court-rolls without the conſent of the lord of the manor. Mr. Plumer then tendered a copy of an admiſſion in evidence on the part of the ſitting member: the evidence was objected to, and the committee, after deliberation, determined, "that as it appeared in evidence that the lord had refuſed the production of the court rolls, the copy ſhould not be received in evidence, unleſs

Copy of admiſſion ſo obtained, rejected.

unleſs it could be proved that the lord had conſented to its production." The vote of James Driver was afterwards determined to be bad, upon the ground of his having given in a wrong occupier.

30th May. William Maſon. Objection, "No freehold." It was propoſed to prove that the premiſes for which he voted were copyhold of the manor of Stepney. To prove this, a witneſs of the name of Wornall was called, who produced a copy of his own admiſſion to a copyhold tenement in the manor. He ſaid, that as a copyholder of that manor he had demanded of the ſteward a copy of the voter's admiſſion, and had obtained it: and he offered to produce it. He admitted, on croſs-examination, that he had no intereſt in Maſon's eſtate. The production was objected to. The counſel for the ſitting member contended for the admiſſibility of the evidence, in the following manner:

Tenant of the manor not entitled to the copy of the admiſſion of another tenant.

It cannot be denied that a copyholder of the manor has a general right to inſpect the court-rolls, or to take copies of them; whether they relate to his own right, or to the rights of the other tenants. This was expreſsly decided in the caſe of The King *v.* Shelly, 3 Term Rep. 141. There it was ſaid, that the perſons making the application having all of them burgages, had an intereſt in knowing who beſides themſelves held by the ſame tenure. In The King *v.* Allgood [m], where the application for a mandamus was refuſed, it had been made by a freehold tenant, who *primâ facie* was not intereſted in knowing who were copyholders. In the caſe of The King *v.* Babb [n], which may be cited on the other ſide, the court of King's Bench held a rule for permitting three aldermen of the corporation (the relators) to inſpect all papers, ſufficiently complied with by the town-clerk, although he only permitted the inſpection of ſuch papers as related to the particular queſtions in the cauſe. But it muſt be remembered, that that was the caſe of a criminal proceeding, *viz.* an attachment againſt the town-clerk; and beſides, the inſpection was granted by a rule of the court; which, conſequently, could only be held to apply to the cauſe then before the court. Theſe caſes,

Argument for the production of the evidence.

[m] 7 Term Rep. 746. [n] 3 Term Rep. 581.

therefore, do not interfere with the general rule laid down in The King *v.* Shelly; and it is ſubmitted, upon the authority of that caſe, that this witneſs had a right to claim a copy, either without avowing his purpoſe in ſo doing, or avowing that his purpoſe was to ſee, who, beſides himſelf, had title to copyholds within the manor. If he has a legal right to the poſſeſſion of the inſtrument, he is at liberty to produce it in evidence: he is even compellable to do ſo. It is not offered for an illegal, but for a commendable purpoſe; neither is the object of it to take away any legal right from the voter. Secondly, although it had been obtained improperly, ſurreptitiouſly, or even illegally; ſtill, being produced in court, and duly authenticated, the court will receive it in evidence, and not inquire in what manner it has been obtained. It is well known, that the only proper method of obtaining the copy of an indictment, is by the order of the court, which is either given or denied at diſcretion. But where in an action for a malicious proſecution, the plaintiff has provided himſelf with a copy of the indictment, the court has always refuſed at the trial to inquire whether or not it has been regularly [o] obtained. In the caſe of The King *v.* Le Merchant, 2 Term Rep. 201. *in not.* copies of letters ſurreptitiouſly procured were allowed to be read in evidence. And in Dr. Dodd's caſe [p], it was held, that a priſoner could not avail himſelf of the objection, that an accomplice had been carried before the grand jury as a witneſs, under an illegal, or a ſurreptitious order,

[o] In Jenman *v.* Cooke, (which was an action upon the caſe for a malicious proſecution for felony at the ſeſſions for the borough of Portſmouth) tried before Thomſon, B. at the Lent aſſizes for Hants, 1804, it being objected by Lens, Serjt. for the defendant, that it did not appear that the copy of the record had been obtained by leave of the court, and that a copy of a criminal record could not be had without ſuch leave, the judge held that as a ſworn copy was produced to him, he could not inquire how the plaintiff came by it, but muſt receive it. And the plaintiff had a verdict. MS. And ſee Jordan *v.* Lewis, 2 Str. 1122., where two being acquitted upon a joint indictment, and a copy of the indictment being granted to one, the other brought his action, and gave that copy in evidence. Lee, C. J. conſidered himſelf obliged to receive the evidence, and a verdict having been given for the plaintiff, the court refuſed to ſet it aſide. In caſes of miſdemeanor, the copy of a record of acquittal may be had without its being granted by the court. Morriſon *v.* Kelly, 1 Bl. Rep. 385.

[p] Leach. Caſ. Cr. L. 184. edit. 1800.

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De la Motte's letters were ſecretly opened at the poſt-office, and copies of them taken [q]; yet the copies were admitted againſt him in evidence.

Argument for the petitioner. It has been already determined, that the ſteward ſhall not be permitted to produce the original court-rolls, without the conſent of the lord of the manor; the queſtion now is, whether a tenant, without ſuch conſent, may produce them? The caſe of the King v. Allgood was decided upon the ground, that even tenants of the manor were not entitled to copies, further than as their own intereſt was concerned. The caſe of the King v. Babb, proceeded upon the ſame principle, as applied to corporators. But if it was legal for the witneſs to obtain a copy of the court-roll, ſtill he can no more be held competent to produce it in evidence for the preſent purpoſe, than the ſteward in the former caſes, who without doubt was in the legal poſſeſſion of the muniments themſelves. Firſt therefore, it is ſubmitted, that the witneſs, though entitled to a general inſpection for the purpoſe of ſearching for evidence of his own title, had no right to take copies of that which did not concern his title; and ſecondly, that even if he was entitled to what he has obtained, he is precluded by the deciſion of the committee, from producing it in evidence, the conſent of the lord of the manor to its production not having been obtained.

Argument againſt the production of the evidence.

The committee determined that the copy ſhould not be received. They ſuffered the witneſs, after argument, to relate, that in point of fact, he had ſeen the voter admitted to ſome premiſes in the manor [r]. This, together with ſome other evidence given, was not conſidered ſufficiently to relate to the premiſes deſcribed on the poll; and the vote was determined to be good.

Deciſion.

Parole evidence of admiſſion.

20th June. Arthur Bott. In the aſſeſſment, the Duke of Portland's name appeared as proprietor. To ſupport the title of the voter, it was firſt proved, by perſons in the employment of his Grace, that the Duke had ceaſed to receive the rent of the premiſes in 1797, and that he had no longer

[q] Eaſt's Pleas of the Crown, 124.

[r] Notice had been given to the voter to produce his title-deeds.

any title to, or intereſt in them. A notice was then proved to have been ſerved (on the part of thoſe who ſupported the vote) on the voter to produce his deeds. He refuſed to produce them; and it was propoſed to put in the memorial of the regiſtry of the conveyance, as evidence of the contents of the deeds. The committee determined, "that there being no evidence given to impeach the freehold, except the name of the Duke of Portland appearing as proprietor on the aſſeſſment, and it being proved that notice was given to Arthur Bott to produce his title-deeds, which he has not produced, the memorial of the conveyance from the Duke of Portland ſhall be admitted to remove the objection ariſing from the name of the Duke of Portland upon the aſſeſſment." It appeared from the memorial, that the Duke had ſold the eſtate to Bott, ſubject to certain uſes and truſts referred to in the memorial, but not ſpecified therein. The committee held it neceſſary that it ſhould be explained what theſe truſts were. Mr. Robinſon being called as a witneſs, depoſed, that he had been employed in the tranſaction as the agent of both parties. Upon this, the counſel who impeached the vote, objected to the witneſs giving any account of the contents of a deed, with which he became acquainted as the agent of the voter, when the voter had refuſed to produce the deed itſelf. The counſel on the other ſide, having no other evidence of the contents of the deed than what might be furniſhed by Mr. Robinſon, began to contend, that it was unneceſſary to go into any further evidence in ſupport of the voter's title, ſince the title of the Duke of Portland was removed, and the only objection to the voter, ariſing from the Duke's name appearing upon the aſſeſſment, was done away. The committee however, held further evidence to be neceſſary; and with reſpect to Mr. Robinſon's teſtimony, they determined, "That he, having been confidentially employed by Mr. Bott to draw the deed which Mr. B. refuſes to produce, ſhall not be examined as to the contents of it." The vote was declared bad.

Memorial evidence of the contents of a deed which the voter will not produce.

One employed to draw a deed which the voter will not produce, ſhall not ſpeak to its contents.

2. Who is compellable to be a witneſs, or to produce written evidence.

17th April. Job Kentiſh, a voter, was ſerved with a ſummons from the chairman on the part of the ſitting member, who objected to his vote, to produce his own appointment, as clerk of a pariſh. It was contended, that no man could be compelled by proceſs of the court to produce evidence againſt his own vote; and that he could only be ſerved with a notice, from the party, to produce it. The chairman informed the voter, that he was not bound to produce his appointment, if he choſe rather to withhold it. The voter not compellable.

This practice appearing to have taken place in ſeveral other caſes, the chairman declared that it was irregular and improper to ſerve orders, or ſummonſes on voters, to produce their title-deeds, and directed all ſuch as had been already iſſued, to be recalled [s]. Reſolution of the committee.

5th June. William Macdowall. An order had been ſerved upon a truſtee to produce a conveyance from the voter of his eſtate in truſt for the benefit of his creditors: no notice had been given either to the voter, or to any of his creditors. The truſtee being ſworn as a witneſs, refuſed to produce the deed; and the committee held that he was not compellable to do ſo. See *ante*, p. 118; and ſee *ante*, vol. 1. p. 98. caſe of Coventry [t]. A truſtee.

See alſo, the caſes under the preceding head.

3. Who is diſabled in point of intereſt from being a witneſs.

29th February. Zachariah Duncan. It was propoſed to call the voter as a witneſs, in ſupport of his own vote, to prove who were his tenants at the time of the election. A voter in ſupport of his own vote.

[s] A ſimilar courſe was adopted by the Bedfordſhire committee. See 2 Lud. 568.

[t] The following motion was negatived by the Glouceſterſhire committee; "That the witneſs having acquainted the committee that he had a deed in his pocket, left with him as truſtee of a marriage-ſettlement, but refuſing to produce it without order of the committee, the witneſs be ordered to produce the ſaid deed." P. 23. The ſame committee held, that the agent of the party ſupporting the vote, who, as ſuch, had obtained inſpection of the title-deeds, could not be examined by the oppoſite party, as to the contents thereof. P. 79.

This was objected to. It was argued in ſupport of the evidence, firſt upon principle, that the intereſt which an elector had in his vote, was not ſuch as could diſqualify him as a witneſs upon this trial: becauſe, whatever his intereſt in it might be, it would not be affected by the event of the cauſe, ſince the determination of the committee would neither eſtabliſh nor deſtroy his right to vote hereafter, nor could this deciſion be in any manner made evidence againſt him, or for him, on any future occaſion[u]: ſecondly, the caſes of T. Ayre, W. Day, R. Taylor, and James Smith, 2 Lud. 405—409. were cited, where the voter was received as a witneſs upon the ſubject of his own vote. On the other ſide, the caſe of William Graves, *ante*, vol. 1. p. 76. was cited, and it was inſiſted that the voter had clearly an intereſt in ſupporting his own vote: that in the caſes cited the voter had been received from neceſſity, to ſtate that which he alone could beſt ſtate, namely, the account he gave of himſelf at the huſtings, and the candidate for whom he voted: but that in this caſe, proof might eaſily have been brought *aliunde*. The committee decided that the evidence was inadmiſſible[v].

To ſupport his own vote by correcting the poll.

29th February. John Harding. In this caſe it was attempted to call the voter to prove that he deſcribed his freehold to be ſituate in White-horſe-alley, Cow-croſs, inſtead of White-croſs-ſtreet, as it was entered in the poll. The committee determined, "That no voter ſhould be allowed to give evidence to ſubſtantiate his own vote, or to correct the poll, as far as his own vote was affected[w]."

A perſon in the ſame circumſtances with

19th May. Thomas Ireland voted for chambers in Staples Inn. The Society of Staples Inn appearing on the aſſeſſment as proprietors, it became neceſſary to ſhew a title

[u] The Glouceſterſhire committee would not permit a voter who had taken the freeholder's oath at the election, to be examined as a witneſs (though willing) to prove that he had no freehold. P. 80.

[v] See 1 Lud. p. 384. to 392.; and caſe of Weymouth, *poſt*.

[w] See *contrà*, 2 Lud. 405. 507., where the committee admitted the evidence of the voter to prove that he had voted for both candidates; his vote having been taken down for one only. And ſee 1 Lud. 384. 392. They alſo admitted him as a witneſs to prove that he gave in other tenants beſides thoſe taken down on the poll. 2 Lud. 409, 410.

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in the voter derived from them. To prove this, Mr. Leeſon was called, who had voted in right of chambers held under the ſociety in the ſame manner as thoſe of the voter were held. His vote had already been decided upon. His evidence was objected to; but it was received by the committee, ſince his own vote, having paſſed queſtion, could not poſſibly be affected by the determination of the preſent caſe.

the voter, but whoſe vote cannot be affected by the queſtion.

4. Of witneſſes who have been in the committee-room during the trial.

13th April. Joſeph Jones. To anſwer an objection made to this voter upon the ſcore of aſſeſſment, a collector of the name of Hill was called as a witneſs. He was objected to, as having been in the room in the courſe of the ſame day. The uſual rule for the excluſion of witneſſes had been affixed to the door of the room, but after a few days of the ſcrutiny, it was entirely diſregarded, and particularly in the caſe of the aſſeſſors and collectors, who being frequently called for, often remained in the room during the whole of the day. The committee upon this occaſion, directed the witneſs to be examined. The next witneſs called, who was neither an aſſeſſor nor a collector, confeſſed, upon entering the box, that he had been in the room a conſiderable time; but as it appeared that for many days no objection of this ſort had been made, nor any care taken on either ſide to exclude the witneſſes, and that many perſons had been allowed to be examined, who had paſſed the whole morning in the room, the committee determined that this witneſs alſo ſhould be examined. And on the 17th April, the chairman pronounced it as the reſolution of the committee, that the objection ſhould not be taken advantage of in particular inſtances, but that if either party deſired that it ſhould be enforced, he ſhould give previous notice of his intention: in which caſe, the committee would give directions that it ſhould be rigorouſly enforced on both ſides. This reſolution aroſe from an objection being taken to the evidence of Philip O'Kelly, who had been preſent in the committee-room[x].

Rule for the excluſion of witneſſes relaxed.

[x] See 3 Ld. Gl. 229. 264.; and the caſe of Ayleſbury, *poſt*.

5. Of the reproof, or puniſhment of witneſſes, for improper conduct.

Witneſs reproved for miſconduct.

8th March. One of the aſſeſſors of the land-tax, who had been ſummoned as a witneſs, was this day reprimanded by the chairman, according to the directions of the committee, for the inconſiſtent manner in which he had given his teſtimony; and he was informed, that if he was guilty of ſimilar miſconduct on any future occaſion, the committee would think it their duty to make a report of him to the Houſe of Commons. The committee further determined, that the aſſeſſment books produced by this witneſs ſhould remain in the hands of the clerk of the committee [y].

Witneſs refuſing to attend ordered into cuſtody.

18th April. Benjamin Weal was ſummoned by an order from the chairman, as a witneſs for the petitioner. On being ſerved with the order, he declared that he would not attend. This anſwer was reported to the Houſe, and he was taken into cuſtody of the ſerjeant at arms, by their order.

Committee permitted to ſend for him to give evidence.

A difficulty then aroſe, with reſpect to the power which the committee had of requiring the attendance of a priſoner in cuſtody of the ſerjeant at arms. As to their power of requiring the attendance of perſons in cuſtody of other gaolers for debt, the inſtance of Sir Watkin Lewes was cited, for whoſe attendance an order was made in the caſe of London, 1804 [z], where he was a petitioner. In the caſe of Ilcheſter, 1804 [a], not only the ſpeaker's warrant had been granted, but a *habeas corpus ad teſtificandum* had been applied for and obtained, from the court of King's Bench, to bring up Sir Edward Price, alſo a priſoner for debt, as a witneſs before the committee. See 4 Eaſt's Rep. 587. The matter was poſtponed, in order that the chairman might have an opportunity of conſulting with the Speaker upon the mode of proceeding moſt proper to be adopted, and he afterwards (21 April) informed the counſel, that the Houſe had ordered, that whenever the committee required the attendance of the witneſs who had been

[y] See Journ. 14th and 18th June, 1804.

[z] Reported, *poſt*.

[a] Reported, *poſt*.

ordered

ordered into cuſtody of their ſerjeant at arms, they might ſend for him [b].

26th May. The committee determined, that any witneſs who does not anſwer when called for, and has been duly ſummoned, ſhall be reported to the Houſe. Witneſſes not preſent when called.

That if it appears that the witneſs has not attended owing to any written or verbal communication from the agents of either of the parties, the ſaid party ſhall loſe the benefit of his evidence, and ſuch witneſs ſhall not be reported to the Houſe [c].

6. Of written evidence.

16th March. John Beaumont. The Duke of Portland was aſſeſſed as the proprietor of the freehold voted for. A conveyance was produced from the duke to the voter, reciting that the premiſes were mortgaged, and containing a covenant on the part of the duke to pay off the mortgage, and afterwards to make a new conveyance to the voter. Then a deed of confirmation by the duke was produced, reciting the payment of the money lent, and a re-conveyance of the eſtate by the mortgagee. It was objected that this recital was no evidence of the re-conveyance: and the committee were of that opinion [d]. Recital in another deed.

29th March. Tims Kight. He voted for a ſhare in Fulham Bridge. The aſſeſſment was upon the proprietors of Fulham Bridge: and it was held neceſſary that the voter ſhould be proved to be one of the proprietors. The dividend-book was produced, in which the name of the voter appeared, as a ſharer; but this was conſidered as not the beſt evidence, as it appeared that there was another book, in which the titles of the ſharers were entered. Upon the production of this laſt, however, it was found to be merely Entry of the voter's name in the dividend-book, and regiſter of a company, in which he had a ſhare.

[b] See Journ. 18th, 20th, and 24th April, 1804.

[c] See alſo the entries in the Journals, 6th and 18th July, of the commitment and reprimand of Cyprian Willock, who was reported to the Houſe for prevarication, by this committee. His evidence related to the proviſions given to the voters in the petitioner's intereſt.

[d] The Bedfordſhire committee would not receive in evidence the contents of deeds in poſſeſſion of the voter, till a notice had been proved to have been ſerved on him to produce them. 2 Lud. 568.

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a regiſter of the conveyances under which the ſharers claimed, and that the conveyances themſelves (*i. e.* the real title-deeds) were in the cuſtody of each ſharer. The actual conveyance in this caſe not being produced, the vote was declared bad.

Certificate of regiſtry of a deed.

13th March. Joſeph Dowling. A certificate of the regiſtry of a deed was offered in evidence, and objected to, as not the beſt evidence. The committee determined not to receive it.

Appointment of pariſh clerk.

17th April. Charles Pegler voted for lands which he held as clerk of a pariſh. *Vid. ante*, p. 107. In the aſſeſſment, one Gurney was rated, whom Pegler had ſucceeded within a year before the election. To prove Pegler's title, a copy from the pariſh regiſter, of an entry of the voter's appointment, was offered in evidence. It was ſaid in objection to this evidence, that an extract from the regiſter was only evidence with reſpect to the particular objects for which the law had cauſed the regiſter to be made, *viz.* baptiſms, marriages, and burials; but not with reſpect to every thing elſe that might happen to be entered there; and that with regard to the entry in queſtion, it was no more than any other private inſtrument, the original of which ſhould be produced. It was anſwered that it was a public inſtrument, relating to the whole pariſh; and the entry being made in a public book belonging to the pariſh, its contents might be proved by an atteſted copy. The committee received the evidence.

Regiſter of the Charter-houſe, of the appointment of an officer.

19th April. William Ramſden. *Vid. ante*, p. 72. The inſtrument by which the voter had been appointed maſter of the Charter-houſe, was proved to have been ſearched for in vain. The Regiſter of the Charter-houſe being ſworn as a witneſs, produced a book from his own office, in which all the leaſes and inſtruments under the ſeal of the governors of the Charter-houſe are entered, and which contained an entry, purporting to be a copy of the original appointment of the voter for life. The entry had been made by the predeceſſor of the witneſs, and the witneſs had never ſeen the original. It was objected, that the entry could not be received in evidence, unleſs it was authenticated by ſome

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one who had ſeen the original. In defence of the admiſſibility of the evidence, it was ſaid, that conſidering the nature of the entry, and the cuſtody from which it was produced, it might be received as of itſelf evidence of the voter's appointment: and the caſe of Tyſon *v.* Clark, 3 Wilſ. 552. was cited, where an old draft of a leaſe was allowed in evidence in the trial of a writ of right, although there was no evidence of a leaſe having been prepared conformably thereto. Secondly, it was contended, that it was admiſſible, as an entry in a public book, produced by a public officer of a corporation, as evidence of an act done by that corporation, namely, their appointment of the voter to be their officer, and their acceptance of him as ſuch. See *R.* *v.* Motherſell, 1 Str. 93. In this point of view it was ſaid to be of as high authority, as the original appointment would have been, if produced. In reply, it was denied that this was a public body; and it was inſiſted, that their entries were no evidence in ſupport of the rights of their own officers. The caſe in Wilſon was diſtinguiſhed from the preſent, by the circumſtances of the paper produced; the paper being in that caſe, of great antiquity. The committee determined to receive the evidence.

7. Of parole evidence to explain written evidence.

See *ante*, p. 134. where it was determined, that the voter himſelf ſhould not be admitted as a witneſs for the purpoſe of correcting the poll. And ſee p. 52.

Voter no witneſs to correct the poll.

20th March. John Bell. Situation of freehold, "Clarges Street." The counſel for the ſitting member propoſed to call evidence to prove that the voter at the poll ſtated his freehold to be in Archer Street; and that the clerk had written Clarges Street by a miſtake. The committee determined, "that evidence to correct the ſituation of the freehold as deſcribed on the poll, ſhould not be admitted."

Evidence as to the ſituation of the freehold on the poll.

8. Of hearſay evidence.

21ſt June. Joſeph Broughton. In order to prove the voter to be owner of the premiſes for which he had voted, a witneſs was aſked, whether he had heard from one Healey (the

Declaration of the tenant, to prove who was the landlord.

(the occupier) who his landlord was? This queſtio objected to, as being hearſay evidence; and it was that the occupier himſelf ſhould have been called as neſs. In anſwer to the objection, the caſe of Da Pierce and others, 2 Term Rep. 53 [e]. was cited, whe declarations of a tenant were held admiſſible to pro whom he held the land. The counſel on the other ſi tinguiſhed that caſe from the preſent, by obſerving, the tenant in that caſe was dead, at the time that his rations were received in evidence: 2. that they were re upon a queſtion of boundary, whether certain lan parcel of one eſtate, or of another; and that in ſuch ſuch declarations were admiſſible, as evidence of reput The committee refuſed to receive the evidence.

Voter's ſtatement to the witneſs of his chriſtian name.

9. Of the confeſſions or declarations of the voter

—— March. Thomas Murphy: aſſeſſed, "John phy." The aſſeſſor ſaid that the voter's name was Th and that he had been aſſeſſed by the wrong name, *ante*, p. 67. But it appeared upon his croſs-examin that he had no other means of knowing the name c voter, but his having lately heard it from the voter hi The committee upon this ground rejected his evidence diſallowed the vote.

[e] And ſee Cowp. 621. Littleworth v. Clarke, Wincheſter, Summ. Aſſ. 1804. Replevin for taking cattle. Cognizance by the defendant as bailiff of W. B. and F. lords of the manor of Bentworth Hall, for one year's quit-rent (6s. 8d.) for a tenement called Gatwick, held of the manor, whereof the *locus in quo* was parcel. Pleas in bar, 1. traverſing that the *locus in quo* was parcel of the tenement called Gatwick: 2. traverſing that the tenement was held of the manor at the rent of 6s. 8d. Dallas and Dampier for the defendant, having proved Henrietta Withers to have been a tenant of the manor, called a witneſs, who ſwore, that the *locus in quo* was part of Gatwick, and that he remembered one Crowcher occupying Gatwick, and that C (who was dead at the time of th while he was in ſuch occupatio the witneſs, that he held it of thers. Lens, Serjt. and Burrou the plaintiff, objected to this being received. But Ld. Ellenb C. J. received the evidence, ſayi LordKenyon had in ſeveral inſtan it to be admiſſible: that it ſtood ferent to the tenant who his was; and therefore, that his tions on that point might be re unleſs an intereſt in him co ſhewn, to have one perſon for h lord in preference to another. fendant had a verdict on both MS.

24th April. Henry Sampſon Fry. The voluntary declarations of the voter ſince the election, with reſpect to the occupation of the premiſes for which he voted were offered in evidence, in order to invalidate his vote. It was objected that ſuch declarations were not admiſſible againſt a third perſon, *viz.* the candidate, who had acquired a title, and an intereſt in the vote through the act of the voter: that there might be a difference with reſpect to the declaration of a voter made before the election: as in a queſtion of title, declarations of the grantor before the grant made are admitted as evidence againſt the grantee, who derives title through him; but his declarations made after the grant are inadmiſſible [f]. To this it was anſwered, that the practice of committees to receive the declarations of voters in evidence was as uniform, and as well known as the practice of excluding voters as witneſſes. That in fact, both theſe depended upon the ſame principle; a voter could not be a witneſs, becauſe he was conſidered, to ſome, though not to all, purpoſes, as a party: that upon this footing, he was ſerved, like any other party, with notice to produce papers; and if he failed ſo to do, their contents were received in evidence: that, if he could not be a witneſs, becauſe he was a party, it followed that his declarations might be given in evidence as thoſe of a party; and there was no difference whether they had been made before, or at, or after the election. In caſes of bribery, the confeſſions of voters were received without objection, although made after the election; and no diſtinction could be ſhewn whether the vote was impeached for bribery or for any other reaſon. In the caſe alluded to, the grantor, after the intereſt in the eſtate had paſſed from him, would be an admiſſible witneſs, and therefore his declarations would not be received. In reply, it was admitted that hitherto the practice of committees had

Declaration of the voter ſince the election inadmiſſible.

[f] It is ſaid, 2 Lud. 411. *in not.* that the Cricklade committee received the declarations of the voter as to his right, made after the vote was given. In the caſe of Yorkſhire, 1735, the Houſe, having reſolved to receive parole evidence to contradict what the voter had ſworn at the poll, determined alſo, (22 Journ. 604.) to admit evidence of what the ſame voter had confeſſed of his having no freehold: but whether that confeſſion was made before or after the election, does not appear.

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been to receive ſuch evidence, and that from 2 Lud. 411, it appears to have been admitted by the Cricklade committee; but it was nevertheleſs contended that this proceeding had been erroneous, inaſmuch as the voter had communicated an intereſt in his vote to a third perſon, which he was not at liberty to defeat by any ſubſequent acknowledgement: as a witneſs, he was clearly inadmiſſible, as he had an intereſt of his own to ſupport: but it did not from thence follow that his declarations could be admitted to defeat the intereſt of others: what he had ſaid before the election was evidence; becauſe the candidate, when he acquired the vote, acquired only ſuch an intereſt as the voter had to diſpoſe of, and ſubject to all objections to which it might be liable in conſequence of any admiſſions of the voter. The committee decided the evidence to be inadmiſſible.

The ſame queſtion was again argued on the vote of W. Harman, May 26, where it was again decided that the evidence was inadmiſſible.

Information gained from the voter by the adverſe party ſince the election.

23d May. Henry Pratt. This voter had been ſerved with an order to produce his title-deeds. See *ante*, p. 120. He had ſhewn to the witneſs who had ſerved him with the order, ſome copies of admiſſions to copyhold premiſes, and had permitted him to take extracts from them. They were objected to, firſt as an account given by the voter of his title ſince the election; (ſee the laſt caſe.) Secondly, as having been procured unfairly from the voter, and as being unfairly taken advantage of, againſt him. The committee reſolved not to receive theſe extracts as evidence againſt the title of the voter.

Declaration of the voter after the election.

26th June. William Pepperday. In this caſe, the counſel for the ſitting member propoſed to give in evidence a declaration of the voter to a perſon immediately after the election, that he had no right to vote. The committee determined that it could not be received.

10. Evidence of particular facts.

Evidence of aſſeſſment, ſee p. 40, 73, of marriage, p. 114. of title, p. 69, *in not.* 114. of wills, p. 114.

Adjourn-

Adjournments of the committee by leave of the houſe.

Adjournments by leave of the Houſe.

On the 28th of March the committee had the leave of the houſe to adjourn till the 9th of April for the Eaſter holidays. On the 10th of May leave was given to Sir W. W. Wynn to attend a court martial on the Monday and Tueſday next, and for the committee to adjourn for thoſe days. A precedent was read from the journals, 11th Feb. 1791, of leave given to Mr. Pelham, ſerving on the Okehampton committee. The committee alſo obtained leave to adjourn over the day appointed for the general faſt: and for his Majeſty's birth-day. See Journ. 23d May, and 1ſt June, 1804.

NOTE (A), from page 11.

Upon the diviſion of caſes before committees.

Committees of election have made their determination upon particular points in the courſe of the trial of the petition, frequently at the requeſt of both parties, and frequently from their own ſenſe of the propriety, and expediency of ſuch a mode of proceeding. Lord Glenbervie ſays, (1 vol. Introd. p. 63.) "though the eſtabliſhed method ſeems to be, that the counſel for the petitioners begin by opening the whole of their caſe, yet, when it happens to conſiſt of ſeveral queſtions, and the determination of one would render the diſcuſſion of the others unneceſſary, (as, for inſtance, if the objections to a ſitting member are, firſt, that he was not eligible; and, ſecondly, that he had not the majority of legal votes) the committee will then, with the conſent of the parties, divide the caſe into ſeparate queſtions." And he refers to the caſes of Briſtol, vol. 1. p. 246. Dorcheſter, 1. 348. Bedford, 2. 71. Lanark, 2. 368. (and ſee Not. (2.) 2d edit.) North Berwick, 2. 426. And ſee note (U), vol. 1. p. 87. In the caſe of Cardigan, 3 Ld. Gl. 187. the agents on both ſides were directed to arrange the different claſſes of votes; and the queſtions, ariſing from the circumſtances of each claſs, were ſeparately argued by the counſel, and decided upon by the committee. Cricklade, 4 Ld. Gl. 17. The caſe was divided into ſeparate queſtions, both as to the right of election, and the ſeparate claſſes of votes, at the propoſition of the counſel for the ſitting member,

member, and with the concurrence of the other ſide and of the committee. Cricklade, 2 Lud. 336. "It was agreed between the parties, to treat the whole caſe reſpecting the borough votes firſt and ſeparately, in order to obtain a deciſion upon it from the committee."

In the caſe of Seaford, 3 Lud. 35. there were three parties. Two of them concurred in deſiring a particular point (reſpecting the right of election) to be ſeparately determined upon, and in the firſt inſtance; the third party would not conſent; but the committee determined, that the ſeparate queſtion ſhould be firſt argued. Honiton, 3 Lud. 164. (A). The petitioners having finiſhed the opening of their caſe, the ſitting member propoſed immediately to ſhew, that the petitioner himſelf was ineligible (his former return having been avoided for bribery): for the petitioners it was argued, that the committee were bound firſt to hear the whole of their caſe: but the committee reſolved, "that the ſitting member might proceed to produce evidence of the ineligibility of the petitioning candidate." Downton, 3 Lud. 176. The propoſal of Mr. Conway, that the opinion of the committee ſhould be taken upon each vote or caſe as it was brought forward, was reſiſted by Mr. Bouverie, as an unuſual thing, and inconvenient to him: and the committee determined, "that the counſel on the part of Mr. Conway ſhould go through their whole caſe." And ſee 3 Lud. 407. Dorcheſter, 1 Fra. 325. The petitioner propoſed, that the queſtion reſpecting the right of election ſhould be firſt argued: the counſel for the ſitting member inſiſted upon their right to have the whole caſe of their adverſaries diſcloſed to them, before they were called upon for their anſwer; but the committee decided, that the counſel ſhould diſcuſs the right, before they proceeded to other parts of the caſe. 2d Steyning, 2 Fra. 403. The counſel for the petitioners having finiſhed that part of the evidence which related to a particular tithing, ſubmitted to the committee whether the caſe ſhould not be divided into claſſes, and that they ſhould now be heard to obſerve upon this part of the caſe. This was reſiſted on the part of the ſitting member, who contended that the whole of the accuſer's caſe ſhould be firſt diſcloſed; and the committee decided accordingly. P. 407.

Of the caſes reported in the firſt volume of theſe Reports, the reader is referred to that of Coventry, p. 34, where, at the requeſt of Mr. Jefferys's counſel, the queſtion upon his qualification was argued and decided upon in the firſt place; to that of Liſkeard where it was agreed, that the deciſion of the committee

ſhould be firſt obtained upon the right of election: to that of Kirdcudbright, p. 442. where, by the agreement of counſel the caſe was divided into ſeparate queſtions: and to that of Caermarthenſhire, p. 288, 289. where, by ſimilar agreement, the queſtions, as to the miſconduct of the returning officer, as to bribery and treating, and as to the majority of votes, were taken ſeparately.

The caſes that have occurred upon the ſeparation of the merits of the election, from the queſtion upon the return, will be mentioned in a note upon the caſe of Middleſex, 1805, *poſt*.

CASE XXXIII.

THE BOROUGH OF MIDHURST, IN THE COUNTY OF SUSSEX.

The Committee was appointed on the 4th of February, 1804, and conſiſted of the following Members:

Rt. Hon. Tho. Grenville, *Chairman.*	Andrew Strahan, Eſq.
Rt. Hon. John Smyth.	Edw. Berkeley Portman, Eſq.
Lord Cha. S. Manners.	Sir Martin Browne Folkes, Bart.
Earl Temple.	Ambroſe St. John, Eſq.
Hon. Wm. Aug. Townſhend.	Benjamin Hobhouſe, Eſq. for the Petitioner, } Nominees.
Wm. Clive, Eſq.	Wm. Dickenſon, Eſq. jun. for the ſitting Member, } Nominees.
John Blackburne, of Lancaſhire, Eſq.	
Hon. Geo. Watſon.	
Rt. Hon. Nath. Bond.	

Petitioner. Thomas Holt White, Eſq.

Sitting Member. Edmund Turnor, Eſq.

Counſel for the Petitioner: Mr. Serjt. Runnington; Mr. Clifford.

for the ſitting Member: Mr. Adam; Mr. Pell.

THERE is no determination by the Houſe of Commons reſpecting the right of election in this borough: it is exerciſed by the burgage-tenants. See 16 Journ. 11, 419. Nov. 24, 1708. Dec. 5, 1710.

The petitioner ſtated in his petition[a], that Mr. Turnor was not duly qualified to ſit in parliament; that he had been guilty of bribery and treating; and that the petitioner had the legal majority of votes, and ſhould have been returned; and he alſo complained of the miſconduct and partiality of the returning officer; but he declined to

[a] The petition was preſented 3d February 1803, and renewed by the petitioning candidate, 23d November 1803. The firſt petition was in the name of the unſucceſsful candidate, and of certain burgage-holders of the borough. It was renewed in the name of the candidate only.

produce

produce evidence before the committee in ſupport of theſe allegations. The only queſtion was, whether or not the petition ſhould be voted frivolous and vexatious? and the petitioner, in order to induce the committee not to come to ſuch a reſolution, proved the death of a perſon, who was ſtated to be a material witneſs, in March 1803; and further, that the ſitting member had been apprized by a notice on the 25th of January 1804, that it was the intention of the petitioner not to oppoſe his right to the ſeat. Beſides the witneſs above-mentioned, whoſe evidence was ſaid to be neceſſary for the petitioner with reſpect to the right of voting, another witneſs was alſo alleged to have died, by whoſe death the petitioner had been prevented from proving ſome particular tranſactions at the time of the election. It was not however ſtated of what nature theſe tranſactions were. Mr. Clifford, one of the petitioner's counſel, being ſworn before the committee, depoſed, that in his opinion, the evidence of the former witneſs was material for his client; but being deſired, on croſs-examination, to ſtate the nature of the evidence which he would probably have given, he referred himſelf to the committee, whether or not he was at liberty to mention that which he knew only in conſequence of a profeſſional confidence. The counſel for the ſitting member immediately abandoned their examination as to this point; obſerving, however, that although the committee would not, in ſuch circumſtances, require an anſwer to the queſtion, yet they could not be expected to make facts concealed from them, the ground of any proceeding. It was further ſaid, on the part of the petitioner, that his intention not to proſecute his petition with effect, having been ſo early ſignified to the ſitting member, the latter had in reality no juſt occaſion to put himſelf to any expence whatever; but it was anſwered, that this conſideration was not proper to be entertained by the committee, ſince it went only to the amount of the coſts, which the committee were not to aſcertain, but other perſons, to whom this matter was referred by the legiſlature, and who, in the exerciſe of their duty, would allow to the ſitting member no more coſts than ſuch as had

Petition frivolous and vexatious.

Profeſſional confidence.

Notice of abandoning a petition.

been really, and neceſſarily incurred[b]. The committee were to ſay, whether they were of opinion that this petition, for the preſenting of which no reaſon had been offered, was frivolous and vexatious. The committee, on the 6th February, determined the ſitting member to be duly elected, and the petition to be frivolous and vexatious[c].

Deciſion of report.

Incidental point. Where what is ſaid by a ſuppoſed agent may be received as evidence of agency.

The committee ſuffered Mr. Clifford to give in evidence a converſation with Mr. Forbes, a gentleman alleged to be an agent of the ſitting member, with reſpect to the notice given by the petitioner not to proſecute his petition, before any evidence had been given of the agency of Mr. Forbes. One of the committee gave it as his opinion, that ſuch converſation ſhould be admitted in evidence, where the nature of it went to prove, not only what had actually been done by the perſon employed, but alſo, that he had been employed by him for whom he profeſſed to act: ſubject however, to further proof of the ſubſequent adoption of his acts, or of an actual employment on the part of his principal[d].

[b] See ſt. 28 G. 3. c. 52. ſ. 20. 22.
[c] See vol. 1. p. 470. 472.
[d] See ante, p. 33. and vol. 1. p. 7. 102. 209. 375. 467.

CASE XXXIV.

BOROUGH OF SOUTHWARK, IN THE COUNTY OF SURRY.

Committee was appointed on the 8th of February, 1804 [a], and consisted of the following Members:

Burroughs, Esq. *Chairman.*	Hon. Galbraith Lowry Cole.
Chaplin, Esq.	Josias Dupré Porcher, Esq.
Holt Leigh, Esq.	John Baker, Esq.
rail, Esq.	John Palmer, Esq.
ller, of Westlooe, Esq.	D. Parker Coke, Esq. for the Petitioner, } Nominees.
rquhar, Esq.	John Berkeley Burland, Esq. for the sitting Member, } Nominees.
Moore, Esq.	
y North, Esq.	
m. Paxton, Knt.	

Petitioner. Sir Thomas Turton, Bart.

Sitting Member. Right Hon. George Tierney.

The Petitioner appeared in person before the Committee, and was also assisted by Mr. Wetherell, as his Counsel.

Counsel for the sitting Member: Mr. Serjt. Vaughan; Mr. Milles.

HE petitioner complained [b], that the fitting member had been guilty of bribery and other illegal practices; id that divers ministers and other servants under the rn of Great Britain, did use the powers of office in the election, in favour of the fitting member, and in de- Petition. Interference of ministers.

The day fixed for taking the petition into consideration, was 7th Fe-. On that day, (there not being cient number of members present e ballot,) the house made an order journing the consideration of it, lso of the Durham election petito the morrow: and orders were , that the names of the members : at the ballots, and not serving on other election committees, should be reported, and that such as had not a sufficient excuse for their non-attendance, should be taken into the custody of the Serjeant at Arms. It was also ordered that the house should be called over on the morrow. See the Journals of this date, and see st. 36 G. 3. c. 59.

[b] The petition was presented 18 July; renewed 23d November 1803.

fiance of the reſolution of the houſe of 10th December 1779; and that many perſons not entitled to vote in the ſaid election, were admitted by the returning officer to poll for the ſitting member; and that many perſons who were entitled to vote, and who tendered their votes for the petitioner, were rejected; and that the petitioner having demanded that the names of all perſons who offered to vote for the petitioner, and were rejected, ſhould be inſerted in the poll-book, as having tendered for him their votes, the ſitting member did ſtrenuouſly object to the ſame, and did prevail on the returning officer to refuſe to comply with the ſaid demand; and that by means of ſuch refuſal, many perſons duly entitled to vote at ſuch election, and who came with intent to vote for the petitioner, were prevented from making a regular and formal tender of their votes; and that a ſcrutiny having been demanded by the petitioner, and granted, the votes of many perſons who were entitled to vote, and who had voted for the petitioner, were ſtruck off the poll, and that the votes of many perſons who were not entitled to poll, and who had voted for the ſitting member, were confirmed; and that divers church-wardens, overſeers of the poor, and other perſons, having the poſſeſſion of the pariſh books of the ſeveral pariſhes in the ſaid borough, did, during the poll and ſcrutiny, conſtantly refuſe to the petitioner, his counſel, and agents, the inſpection of the ſaid books; and did frequently, during the ſaid ſcrutiny, by the procurement and under the ſanction of the ſitting member, refuſe to produce the ſaid books in evidence, although repeatedly requeſted by the high bailiff ſo to do; by which means the ſaid ſcrutiny was rendered ineffectual to the petitioner."

Improper admiſſion, &c. of votes.

Refuſal of returning officer to accept tenders.

Scrutiny.

Refuſal of pariſh-officers to produce their books.

Right of election.

The right of election in this borough was determined 10th November 1702, to be "only in the inhabitants paying ſcot and lot." See 14 Journ. 25 [c].

Petitioner's caſe.

The petitioner, having made a general opening of his caſe, proceeded, in the firſt place, to eſtabliſh his right to the

[c] The counſel for the petitioner inſiſted, "that none, of common right, ought to vote, but ſuch as were liable to pay wages to their members; and thoſe were only ſuch as paid ſcot and lot." The oppoſite party contended for a right in all the houſeholders, not receiving alms.

ſcat

ſeat, by endeavouring to ſhew a majority of votes in his favor. The majority againſt him upon the original poll, had been 81; and a ſcrutiny having been demanded by him, and granted by the returning officer (the high bailiff), that majority was further increaſed to 96. He propoſed to prove that the legal majority was in his favor, by adding to his own poll, 1. the votes of between 80 and 90 perſons who had (as he ſtated) tendered their votes for him, and had been rejected upon the ground of their poor-rates being paid by their landlords, and not by themſelves; their names however, appearing on the rates: 2. the votes of ſeveral, whoſe rates were paid for them by their landlords, and whoſe names were not inſerted in the rates: 3. the votes of others who were rated by name, but who had not in fact paid the rate, the word "excuſed" being marked oppoſite to their names, in the books of rates: 4. he propoſed to add ſeveral other votes to his own poll, which had been diſallowed by the returning officer for various reaſons; and to ſtrike off ſeveral from the poll of the ſitting member, who were not, as he contended, legal voters.

Farmed votes.

Miſcellaneous objections.

The firſt point upon which he produced any evidence, was the tender of thoſe perſons who conſtituted the two firſt claſſes above mentioned, and whoſe votes had been rejected, upon the ground of their rates being paid by their landlords. The particular circumſtances that appeared with reſpect to this part of the caſe, gave riſe to a queſtion as to the ſufficiency of the tender. The following are the principal facts proved. It muſt be obſerved, however, that in ſome particulars, a difference of opinion ſubſiſted among the witneſſes, as might be expected, in a ſcene of great confuſion, and in a very warmly conteſted election.

Evidence of tender.

The election laſted nine days (7—16 June, 1803.) On the firſt days of the poll, perſons, whoſe rates had been paid by their landlords, were rejected by the poll-clerk, with the concurrence of the inſpectors on each ſide. A determination of the returning officer had taken place on the firſt day of the election reſpecting one of them, which will be mentioned hereafter. On Saturday, the fifth day of the poll, the petitioner manifeſted an intention to poll the *farmed*

voters, (as ſuch perſons were commonly called), and about fifteen of them preſented themſelves at the booth allotted to the pariſh of St. George. The poll-clerk took down their names upon the poll, and having made a mark againſt them, according to directions he had received from the returning officer, ſent them round to the returning officer's booth, without making any further entry on the poll. Some altercation took place in conſequence of this, between him and the inſpector for the petitioner, who deſired that their votes might be taken. On the Monday following, the inſpector for the petitioner (Mr. Speck) ſtill inſiſting upon the poll-clerk receiving the votes of the ſame deſcription of perſons, and demanding a formal entry of the tender of their votes to be made on the poll, the poll-clerk went to the returning officer for further directions. The petitioner was there at that time. After a warm diſcuſſion, the poll-clerk returned with a paper, containing the following direction from the high bailiff, written by the petitioner himſelf.

"When a voter comes up to poll, he is to be aſked his name and place of abode, and then, whether his landlord pays his poor rates: if he anſwers in the affirmative, he is to be ſent to the huſtings: the poll-clerk is not to take his name down."

After this, the poll-clerk, as ſoon as he had heard that the perſons preſenting themſelves were farmed voters, ſent them round to the huſtings immediately, without inquiring their names, or, for whom they came to vote.

Mr. Speck depoſed, that on the Saturday, in conſequence of the refuſal of the poll-clerk to receive the votes, or the tenders, of the farmed voters, he aſked ſeveral of them for whom they would have voted, and that ſeveral of them named the petitioner: that he took down ſome of their names, but was unable to keep an accurate account, owing to the confuſion which prevailed at the booth: and in fact, no tender of any particular voter, on the Saturday, was proved. He ſaid further, that on Monday, he ſtill continued to inſiſt upon a tender being made of the farmed voters, at the booth, to the poll-clerk, even after the contents of the abovementioned paper had been made known: that he

he aſked them their names, and for whom they came to vote, and took down their names, and votes, in a book. In general, voters of every other deſcription took the bribery oath, and the oath of qualification: but the poll-clerk would not adminiſter any oath to the farmed voters.

It was further proved, that at the high bailiff's booth, the voter who had been ſent round there was aſked his name and reſidence, which was entered in a book. That then he was aſked, whether his landlord paid his rates; and as ſoon as it was known that he was a farmed voter, he was rejected: and that no one was aſked by the high bailiff for whom he meant to vote: but that ſeveral of them declared, of their own accord, that they came to vote for Sir T. Turton. Some of the witneſſes ſaid, that the high bailiff refuſed to aſk of any ſuch voter, for whom he meant to vote.

It further appeared, that on the firſt day of the election, a farmed voter having tendered his vote for the ſitting member at the booth belonging to the pariſh of St. John, was objected to as ſuch by Mr. Speck himſelf, who then attended at the booth on behalf of the petitioner: and that the voter being ſent round to the huſtings, it was agreed on all hands, and determined by the high bailiff, that he had no right to vote; and that no further argument took place at the huſtings until the Saturday, reſpecting their right: the only thing required, being, to aſcertain the fact of their rates being paid for them. On the part of the petitioner, it was repreſented, that the vote being objected to and ſtruck off in the pariſh of St. John, was in conſequence of an agreement between the inſpectors on each ſide, relating merely to two farmed voters in that pariſh, one of whom was underſtood to be in the intereſt of the petitioner, the other in that of the ſitting member. In the election in 1802, the farmed votes were polled for ſome time, the letter F. being marked againſt their names: at length, their right to vote being argued before the counſel for the high bailiff, he decided againſt them, and ordered the votes of ſuch as had already been received, to be ſtruck off. It was ſworn by ſome of the witneſſes, that in former elections they had never been permitted to vote.

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A very long examination of ſeveral witneſſes took place on the ſubject of the paper, written by the petitioner; the counſel for the ſitting member endeavouring to ſhew, that what was contained therein was the original propoſal of the petitioner himſelf; while it was endeavoured, on the part of the petitioner, to ſhew that it was only a memorandum which he made of the determination of the high bailiff. The reader will find, from the determination of the committee upon this part of the caſe, that they adopted the concluſion contended for by the ſitting member, at leaſt ſo far as to conſider the petitioner a party to the direction contained in the paper, and to be bound by the terms of it.

The firſt queſtion aroſe upon the vote of Thomas Jackſon, who was proved to have preſented himſelf to the poll-clerk on Monday (after the delivery of the paper), and to have demanded to vote for Sir T. Turton. The poll-clerk, having underſtood from him, that his landlord paid his rates, refuſed to take his vote; and told him to go round to the huſtings. Mr. Speck, who ſtood cloſe to the poll-clerk, having aſked him for whom he meant to vote, he anſwered, for Sir T. Turton. It was proved that Jackſon had lived in his houſe in St. George's pariſh upwards of ſix years, and the following entry was read from the rate of Jan. 1803. "King-ſtreet. Thomas Jackſon. £. 5."——"2s. 6d."

On the part of the petitioner, it was inſiſted that this was a ſufficient tender of Jackſon's vote, for the following reaſons:

Argument, that the tender is ſufficient: in what caſes it need not appear on the poll.

Where a voter goes up to the huſtings at an election, and tells the poll-clerk that he comes to vote for a particular candidate; that he is ready to take the oaths, if required; and to anſwer whatever queſtions the poll-clerk may put to him reſpecting his right to vote; if the poll-clerk will not take down his name, the candidate, for whom he tenders, has a right to employ an agent of his own, to take down the name, &c. of ſuch voter, and he may avail himſelf, on a future occaſion, of this tender[d]. The tender to the poll-

[d] See the caſe of Harwich, *ante*, vol. 1. p. 394. and note (A) at the end of this caſe.

clerk,

clerk, is the only tender which can legally be made; and if the voter has done all that was in his power towards a complete tender of his vote to the poll-clerk, the committee, if he had a good title to vote, will add him to the poll. It is clear, in this case, that, independently of the direction written by the petitioner, the voter had done every thing necessary to a legal tender of his vote for the petitioner. He had presented himself to the poll-clerk; declared his name, and for whom he meant to vote; and was ready to take any oath that might be required of him, or to answer any questions which might be put to him. If, in such circumstances, the poll-clerk refused to receive his name, and his vote, the clear law is, that proof may be received *aliundè*, of the fact of his voting. It is doubtless necessary, that the voter should go further than the mere declaration of giving his vote; as was decided in the case of Gloucestershire, p. 30[e]. He must name a particular candidate, and make his declaration to the legal officer: who, in strictness, was the poll-clerk, and not the high bailiff, to whom he was sent round. The poll-clerk is the person authorised by stat. 25 G. 3. c. 84. s. 7. to take the poll, and is bound by an oath to the legal discharge of his duty. The Gloucestershire committee determined, that a voter, declaring in the booth his intention to vote for a particular candidate, *but not to the poll-clerk*, was not a good tender. p. 32, 33, 34.

The tender should be to the poll-clerk.

It is next to be considered, in what manner the paper written by the petitioner, can operate, to alter the effect of this tender, and render it of no avail? It is admitted, that in a case where there is no petition of electors, a formal agreement between two candidates that certain persons should not poll, might operate, as between those candidates, to prevent either of them from availing themselves of the tender of such persons, or proving their right to vote before a committee: but here, the paper was no more than a reduction into writing by the candidate, of what he understood

Effect of the written direction.

[e] It was determined, "that it is necessary for a person claiming a right to vote, to prove having tendered his vote for a particular candidate, before evidence be allowed to establish such vote."

to

to be the opinion of the high bailiff; to which he was bound to ſubmit, but which did not preclude him from inſiſting upon the tender actually made before the poll-clerk. It cannot be conſidered as a compact that the farmed votes ſhould not be polled: the whole conduct of the petitioner and of his agents clearly ſhews that no ſuch compact was thought of: and what paſſed reſpecting the votes in the pariſh of St. John cannot be extended beyond that pariſh, ſo as to affect the whole of the poll. At moſt, it amounted to nothing farther than a general underſtanding, founded upon the proceedings of former elections, and that underſtanding could not be ſaid to exiſt on the fifth day of the poll, when ſuch ſtrong exertions were made on the part of the petitioner to get the farmed votes on the poll. Upon their being ſent round to the huſtings, it was the duty of the high bailiff himſelf, under whoſe authority the poll-clerk had refuſed to take down the name and vote of this perſon, to have taken down both his name and his vote: the agreement, or deciſion, acquieſced in and committed to writing by the petitioner, muſt have been, impliedly, upon the terms of the tender being made to the high bailiff: otherwiſe, no poſſible advantage could be obtained or expected from it by the petitioner, whoſe avowed object it was to avail himſelf, in the fulleſt manner, of the benefit of the farmed votes. That advantage having been denied him, in fraud of the original deciſion, and of the true ſenſe of it, it becomes competent to him to recur to the tender before the poll-clerk, which, at moſt, he only can be ſaid to have abandoned upon the condition of the tender being made, and accepted, elſewhere. Upon the whole it is ſubmitted, 1. that a legal tender has been proved: 2. that the regulation contained in the written paper, however it might relate to the receiving of votes by the poll-clerk, cannot in point of law be ſaid to prevent the effect of a tender made to him, he being by law the perſon to whom ſuch a tender ſhould have been made: 3. that even, if ſuch ſhould be held to be the effect of it, ſtill, it was acquieſced in upon the implied condition of the tender being completed before the high bailiff, and that condition not having been effectually fulfilled, the agreement

ment itſelf ſhould not be enforced to the prejudice of the petitioner.

The counſel for the ſitting member argued in the following manner:

The committee are called upon to decide, firſt, whether Jackſon's vote can be conſidered as having been ſufficiently tendered? Secondly, ſuppoſing the tender to be ſufficient, when conſidered without relation to the petitioner's conduct, whether, there being no petition from the electors, the petitioner has not, by his own conduct, precluded himſelf from the advantage he might otherwiſe have derived from that tender? Argument, that the tender is inſufficient.

Firſt, it is ſubmitted, that the argument of the petitioner is drawn from a falſe principle, ſo far as it is founded upon an opinion, that the tender of a vote before the returning officer is leſs legal, or leſs effectual, than a tender before the poll-clerk. The poll-clerk is the ſervant of the returning officer, and aſſiſts him in the diſcharge of his duty: but the act of the poll-clerk is the act of his ſuperior, and if he ſhould refuſe a vote, an action would not lie againſt him, but againſt the returning officer, who is the only reſponſible perſon. It is neceſſary that he ſhould be, conſtructively at leaſt, preſent during the whole of the election. It is by his judgment that each vote is received or rejected. The ſtat. 25 G. 3. c. 84. had not for its object, to diſcharge him from any part of his duty; ſtill leſs, to create another independent and ſubſtantive office: but only, to permit ſome part of his duty to be executed by a deputy, which the multitude of electors, and the ſpace of time limited for the election, rendered it inconvenient, or impoſſible, for him to execute in perſon. The deputy, thus conſtituted, is bound by an oath faithfully to diſcharge the functions allotted to him: but it is a great miſapprehenſion of the ſtatute, to ſuppoſe, that the original functions of the returning officer have been ſuperſeded by it, or transferred to the poll-clerk. The Glouceſterſhire committee decided, that a declaration made in the booth (i. e. not to any particular perſon, or to a ſtranger), and not to the poll-clerk, was not a good tender: but had the tender been made to the ſheriff in perſon, inſtead Poll-clerk is only the deputy of the returning officer.

Tender to the principal good.

ſtead of the poll-clerk, it is not probable that they would have held it to be bad.

If it be admitted, that the returning officer, and he only, has the power of deciding upon a diſputed vote referred to him from the place of polling, it can hardly be denied that he has the power of directing that voters of a particular deſcription ſhould be ſent round to him in the firſt inſtance, and of reſerving to himſelf the taking the poll, as far as relates to them. He may exclude them altogether from the province of the poll-clerk, and may direct them to tender their votes to him in perſon. If this arrangement is ſufficiently notified to the voter, it is his duty to preſent himſelf to the returning officer, and make his tender to him. The poll-clerk as to ſuch a voter, is a mere ſtranger, as ſoon as he has been informed, that the returning officer has reſolved to act for himſelf, and not by deputy, in his particular inſtance. Such has been the mode of proceeding in the preſent caſe. Aſſuming, for the preſent, that the written paper containing the direction to the poll-clerk, was the act of the high bailiff only, to which the petitioner was no party, it is a declaration on the part of the preſiding officer, that he will act for himſelf in receiving or rejecting the votes of that particular claſs of perſons known by the name of farmed voters. It has been ſufficiently proved, that this reſolution was in all caſes made known to the voters; and particularly in the preſent inſtance, when the voter actually went round to the high bailiff's booth, in conſequence of that reſolution being intimated to him. The refuſal of the poll-clerk to take down his name, and his direction to him to go round to the high bailiff in the firſt inſtance, amounted to a legal and complete notice given to him, that it was to the returning officer, and not to the poll-clerk, that he was to addreſs himſelf. Then, his duty was to follow the directions that he had received, and to preſent himſelf to the high bailiff, and make to him a formal tender of his vote for a particular candidate. Not having done ſo, he has not done every thing in his power towards giving his vote, and conſequently, he has not brought himſelf within the terms of the petitioner's propoſition. There is no pretence, in any view of the

The returning officer may direct the tender to be made to him.

the caſe, to ſay that the committee ſhould attend to any thing that paſſed at the poll-clerk's booth, between the voter, and the agent of the petitioner. Polls taken before other perſons beſides the returning officer, have always been received in evidence with extreme caution, and in very particular caſes only. In the caſe of Cricklade, 1 Ld. Gl. 313. there was ſtrong evidence of the poll being unduly cloſed by the returning officer, under the pretence of a riot: yet the committee refuſed to receive a poll taken in his abſence, by a ſtranger. Here, it is not even proved that the vote had been rejected. On the contrary, it had only been intimated to the voter, that he muſt preſent himſelf to the high bailiff. It ſhould therefore have been further proved, that he openly declared in the preſence of the high bailiff, for whom he meant to vote: and if, in ſuch circumſtances, his declaration had been noted down by any perſon preſent, it is admitted that the committee might receive evidence thereof.

Polls taken by ſtrangers.

Secondly, conſidering this queſtion with reference to the conduct of the petitioner himſelf, it is ſubmitted, that he has precluded himſelf from taking advantage of what paſſed before the poll-clerk. It is to be recollected, that this is not the petition of an elector, who complains of an infringement of his rights; if it were ſo, the acts of a candidate could not be ſet up as an anſwer to that complaint: but it is the petition of a candidate; and it is equally unjuſt, that a candidate ſhould be permitted to ſet up the rights of an elector, in order to annul his own act. In queſtions that have ariſen between candidates, the Houſe of Commons has always held them bound by their own agreements, however ſuch agreements might, in another point of view, be conſidered void, as interfering with the privileges of others. Evidence has been given in the preſent caſe, to ſhew, that the farmed voters were rejected at the preceding election: that at the election in queſtion, the firſt objection againſt a farmed voter came from the ſame agent for the petitioner, who is proved to have been ſo active afterwards in requiring the admiſſion of the reſt: and laſtly, that the direction given to the poll-clerk on the Monday, was written by the petitioner himſelf, with a view, probably, to his own advantage. The petitioner

The effect of the written paper.

Candidates bound by their own acts.

tioner applies to the committee to receive ſecondary and imperfect evidence of the tender of a vote: the foundation of ſuch an application is, that the returning officer, or his agents, have by their miſconduct deprived him of the primary and legal evidence, namely, the entries recorded on the poll: but that foundation fails, where it appears, that their ſuppoſed miſconduct aroſe from the act of the very perſon who makes the application.

Determination of the committee.

The chairman on the next day (17th Feb.) declared the determination of the committee to be, "that the petitioner, by his own conduct, had precluded himſelf from the advantage of any tender to the poll-clerks of farmed votes, made poſterior to the delivery of the paper[f]."

Caſe of a voter who tendered in the preſence of the returning officer.

The petitioner, having failed in an attempt to prove a tender by Jackſon of his vote to the high bailiff, called a perſon of the name of William Vince, who depoſed, that having offered his vote to the poll-clerk, and having been ſent round by him to the bailiff's booth, he found there both the high bailiff and the deputy bailiff: that having declared his name, and that his landlord paid his rates, he was deſired to withdraw: after which, and before he went away, ſome perſon whom he did not know, ſtanding near the high bailiff, aſked him for whom he would have voted: that he ſaid, for Sir T. Turton; and that he was ſure that both the high bailiff and his deputy muſt have heard him[g]. It had before been proved, that the returning officer had refuſed to aſk any of theſe voters for whom they would have voted; and that in one inſtance, he checked an agent of the petitioner for aſking that queſtion. It was admitted, that this evidence entitled the petitioner to conſider Vince's vote as legally tendered; and that he might proceed to give evidence of the

[f] Had the committee conſidered the tender of Jackſon to the poll-clerk to have been ſufficient, the petitioner would have been entitled to offer evidence of the right of 150 perſons, who had made their tenders in ſimilar circumſtances. The reader perceives, that the determination of the committee upon this point, proceeded upon the ſecond ground taken by the ſitting member's counſel: the direction contained in the paper mentioned *ante*, p. 152. being conſidered to be the petitioner's own act.

[g] No objection was made, upon this occaſion, to the teſtimony of the voter himſelf. But ſee *ante*, p. 134. Vol. 2. p. 76.

voter's

voter's right. His caſe was this: he had occupied for five years a ſmall houſe in the pariſh of St. George, at the rent of 2*s.* 8*d.* by the week, of a perſon of the name of Falknor, who, having ſeveral other ſmall tenements in the ſame pariſh, made a compoſition with the pariſh-officers for the payment of a certain ſum of money in lieu of the poor's-rates of all of them (whether occupied or not), and charged his tenants with an increaſed rent, in conſequence of that payment. The following entry was ſhewn in the rates of January, and April, 1803, for the pariſh of St. George. "Weſt diviſion. Queen's court. William Vince. Rental, £5. Aſſeſſed, 2*s.* 6*d.*" But Vince had never paid the rate. The pariſh-officers had twice ſummoned him before the magiſtrates, for the purpoſe of enforcing the payment of the rate from him; but in each caſe the proceeding was put an end to by the landlord, who ſatisfied the pariſh. The collection of the poor's rates in the borough of Southwark is regulated by a particular ſtatute. It appeared to be a frequent practice in the pariſh, (many houſes therein being occupied by perſons in low circumſtances, taken by the week, and often changing their inhabitants) for the landlord to agree with the overſeers for the payment of an annual ſum, ſomewhat below the proper amount of the poor's rate, but to be paid whether the houſe were occupied or not. The compoſition paid was uſually the amount of the rate upon two-thirds of the eſtimated rent of the premiſes, after deducting the taxes, and other outgoings. Sometimes, where the tenants were very poor, the compoſition was paid upon only one-third of the rent. In the rate the full rental, and the rate payable upon it, were inſerted: but in many inſtances, a memorandum was made, by means of a private mark, or otherwiſe, on the oppoſite page, of the rate being farmed. It is eaſily ſeen that this abatement was compenſated to the pariſh by the continual payment of the ſtipulated ſum, and by the reſponſibility of the perſon with whom the contract was made. It happened in ſome inſtances, that the name of the landlord only, in others, that of the tenant, was inſerted in the rates: ſometimes, the name of the landlord was inſerted, and afterwards the names

Voter rated; but the rate compounded for by the landlord. Caſe of Wm. Vince.

Farming the rates.

of the tenants, in order to diſtinguiſh the premiſes: and in ſome caſes, where the landlord had failed in his payments, his name was eraſed, and the name of the tenant was ſubſtituted in its place, in order to afford the pariſh-officers an opportunity of taking their legal remedies againſt the tenant; and inſtances were ſhewn, where the tenants had actually been applied to for payment, on the default of their landlords, and where magiſtrates had granted warrants of diſtreſs againſt them. The landlords, who had made their agreements with the pariſh-officers in the manner abovementioned, were ſaid to have *farmed* the rates of their houſes: and hence, the votes of the tenants were commonly called, at elections, *farmed votes*.

Argument againſt the vote.

The counſel for the ſitting member, who objected to the title of the voter, after obſerving, that the payment of ſcot and lot was univerſally underſtood, with reſpect to rights of election, to ſignify the contribution to the poor's rate, contended, that in the preſent caſe, Vince had no right to vote, 1. becauſe the money paid was not in fact a poor's rate: 2. becauſe, ſuppoſing it to be a poor's rate, it was not actually paid by the voter himſelf.

1. The money paid is not for a poor's rate.

Firſt, This is a mere perſonal contract between the pariſh-officers, and the landlord, that the latter ſhall pay a certain ſum of money annually, not as a poor's rate, but in lieu of it. A poor's rate is only payable in reſpect of premiſes that are in the occupation of ſome perſon; but this ſum is payable, whether the premiſes are occupied or not. Should the landlord refuſe to pay, no remedy by diſtreſs could be had againſt him; ſince the ſum cannot be ſaid to fall within the deſcription of any ſums to be raiſed according to the proviſions of the ſtat. 43 Eliz. c. 2.; for the levying of "which ſaid ſums of money," the remedy by diſtreſs is given. For ſuch ſums are to be raiſed by taxation of certain claſſes of perſons mentioned in the act, among which, the landlords of premiſes occupied by others, are unnoticed: and the mode of raiſing money is not ſo properly a taxation, as a contract, in lieu of the taxation; and for which the exemption from taxation, in favour, not of himſelf, but of his tenant, may be ſaid to be a ſufficient

conſideration,

conſideration. The only remedy therefore which the pariſh-officers could have againſt the landlord in caſe of his failing to pay the ſtipulated ſum, would be an action upon the contract. It is very queſtionable, whether the tenant in ſuch circumſtances is liable to be diſtrained upon for the rate, where his landlord has made default; for there is a privity between the tenant and the pariſh, in conſequence of the agreement made between the latter, and his landlord; ſince the pariſh have agreed to accept a certain ſum in lieu of the rate payable by the tenant, for which the remedy by diſtreſs is given; and ſince by reaſon of the landlord taking upon himſelf the diſcharge of the rates by conſent of the pariſh, the tenant is obliged to pay a higher rent to his landlord. The court of King's Bench in ſuch a caſe would not iſſue a mandamus to a magiſtrate to grant a warrant of diſtreſs againſt a tenant.

Secondly, in this caſe, ſuppoſing the ſum paid to the pariſh to be entitled to the name of a rate, it is not paid by the voter. It is neceſſary that the payment ſhould be actually made, and *eo nomine*, by the perſon claiming to vote. That cannot be ſaid to take place, where the landlord of the voter pays the rate, the voter paying to him an advanced rent in conſequence. Such a perſon cannot be ſaid, in the language of ſtat. 26 G. 3. c. 100. to be an inhabitant, bearing the burthens of the borough: he has diſcharged himſelf from thoſe burthens, by a contract of a peculiar nature; and has therefore voluntarily renounced the rights annexed to them by the law. The acquiſition of the right of parochial ſettlements, which formerly was annexed to ſimilar burthens, ſtood upon the ſame footing. An actual payment was held to be neceſſary. This conſideration renders it immaterial to this caſe, that the name of the voter ſtood on the rate, ſince the eſſential qualification, *viz.* the actual diſcharge of the duty, is wanting. The inſertion of the name of the tenant in the rate, might be convenient for the pariſh officers, and might enable them to identify more diſtinctly the premiſes to be diſcharged from the rate in conſequence of the agreement made with the landlord: but all the facts proved before the committee ſhew, that it was not the tenant, but

2. Not paid by the voter.

the landlord whom they conſidered to be their debtor. Laſtly, admitting the ſum paid to be for the poor's rate, and to be virtually paid by the tenant; ſtill he would not be qualified to vote, ſince he has not paid the whole rate, but only a part of it. It is neceſſary that the voter ſhould bear his full ſhare of the pariſh burthens; becauſe no line can be drawn, as to how much of the rate muſt be paid, to entitle a man to vote: if it is conſidered ſufficient for him to pay two-thirds of the rate, it muſt be conſidered alſo ſufficient, if he pays only a fiftieth or hundredth part; for the quantity can make no difference, if the principle be once admitted, that the payment of the whole rate is not neceſſary.

He muſt pay the whole rate.

Argument in ſupport of the vote.

1. The money paid is a rate.

The petitioner, in his anſwer to theſe arguments, contended, that the tenant, whoſe name appeared on the rate, was in law liable to the payment of the ſum aſſeſſed, and that the pariſh had a right to diſtrain upon him for what was due, if his landlord ſhould fail in the performance of his contract. As long as that contract is performed, there may be great convenience in purſuing ſuch a courſe; it may be competent to a pariſh officer, in the exerciſe of his diſcretion, to agree to accept a ſmaller ſum, regularly paid, and well ſecured, rather than to demand the full amount of his rate from a weekly lodger, whoſe continuance in the pariſh, and ability to pay, are uncertain. But it does not from thence follow, that, if default ſhould be made in the ſum ſtipulated for, the remedies which the law affords for the relief of the poor would not be operative. No authority has been cited to ſhew that the ſum actually aſſeſſed upon the tenant might not, in theſe circumſtances, be levied by diſtreſs; ſince it appears in the book of rates, as a rate, impoſed upon the real occupier of the premiſes. The circumſtance of a leſs ſum being accepted than the full amount of it, might be a matter of complaint upon an appeal, but does not affect the remedy by diſtreſs: and it is difficult to imagine how the agreement between the landlord and the pariſh, after it had been broken on the part of the former, could be ſet up againſt the right of the latter to diſtrain. Neither is it material, that the ſum ſtipulated is payable by the landlord, whether the premiſes be occupied or not; ſince in the preſent

ſent caſe the tenement for which the vote was given was indiſputably in the occupation of the voter, and of no other perſon.

With reſpect to the other ground of argument taken on the part of the ſitting member, it is ſubmitted that here was a ſufficient payment made by the voter. The law of parliament is not ſo ſtrict in this reſpect, as the law of parochial ſettlements is, the latter caſe being governed by the expreſs words of the ſt. W. 3. which require that a man ſhall be both rated, and pay the rate, in order to gain a ſettlement. The law of parliament is compriſed in the general and comprehenſive term of paying ſcot and lot, a term, which is now univerſally underſtood to mean, bearing the burthens of the pariſh. It has never been decided that an actual and perſonal payment is neceſſary, to ſatisfy the law: it has been held indeed, that perſons excuſed on account of poverty, or refuſing to pay the rates on demand, are diſqualified; but ſuch caſes differ widely from the preſent, where the rate, although paid over to the pariſh by the hands of the landlord, is in reality firſt advanced by the tenant to him, in the form of an increaſed rent. Upon the voter therefore, the burthen in this caſe, actually falls; it is borne by him, and therefore it is but reaſonable that the franchiſe annexed to that burthen ſhould alſo belong to him. No authority has been cited to ſhew that a *bonâ fide* inhabitant, rated and paying to the rate, has been held diſqualified, upon the ground of his not having paid the full amount of the ſum aſſeſſed upon him. 2. Paid by the voter.

It was determined by the committee "that William Vince was not entitled to vote at the laſt election for the borough of Southwark [h]." Deciſion.

[h] See the caſe of Bridgewater, *ante*, vol. 1. p. 103. Colcheſter, 1789, *ante*, vol. 1. p. 507. In the caſe of Abingdon, where the right is in inhabitants paying ſcot and lot, the Houſe negatived a reſolution, (16 Journ. 65. 20th January 1708), that the rector of St. Helen's, in Abingdon, being of ſufficient ability to pay pariſh taxes, but excuſed on account of his function, had a right to vote. *In the caſe of* Honiton, 16 Journ. 505, 17th Feb. 1710, evidence was given, to diſqualify a voter, that his taxes were paid by his landlord; but no determination of the Houſe upon this point, appears. By ſt. 11 G. 1. c. 18. ſ. 19. perſons are excluded from voting in London, who have, within two years before the election, been excuſed the payment of rates at their own requeſt.

Caſe of the perſons whoſe names were not inſerted in the rate.

The committee had deſired that the caſe of the perſons whoſe rates were farmed, and who were not named in the rates, ſhould be diſcuſſed in the ſame argument. The counſel for the ſitting member inſiſted that this was an additional ground of objection to the voters who ſtood in theſe circumſtances: the petitioner contended, that they were equally liable to pay the rate, as if they were named in the rate, and that the omiſſion of their names made no difference. Theſe votes were diſpoſed of by the deciſion of the committee that Vinee's vote was bad.

S. M. declared duly elected.

Upon the foregoing reſolution of the committee being intimated to the petitioner, he declined producing any more evidence in ſupport of his caſe, and the ſitting member, on the 22d February, was declared duly elected.

Incidental points.

It may be proper to ſtate ſhortly the evidence given to ſupport the laſt charge in the petition, *viz.* the refuſal of the pariſh-officers to produce, at the poll and ſcrutiny, the books of the poor's-rates, for the inſpection of the petitioner. It appeared that the pariſh-officers of St. George's pariſh, to which the queſtion principally related, upon the demand from each party of a copy of the rates of January and April preceding the election, had delivered to them copies taken from the rate itſelf, without any memorandums, or private marks, by which it could be diſtinguiſhed, who were excuſed from the payment of their rates, either on account of poverty, or of any agreement between their landlords and the pariſh; that they conſtantly refuſed to the petitioner and his agents, both at the poll and ſcrutiny, the inſpection of the rates; ſhewing only the entry in the rate reſpecting the particular voter in queſtion, and not ſuffering them even to ſee whether there were any private memorandum or mark ſet againſt his name in the oppoſite page, nor to purſue their inquiries further in the book, as they repeatedly requeſted permiſſion to do. The aſſeſſor (Mr. Serjt. Runnington) ſaid, that at the ſcrutiny, there was, at firſt, ſome heſitation on the part of the pariſh-officers to produce the rates; and that he threatened them with a criminal information, and a report to the Houſe of Commons if they refuſed to produce them; that then they were produced,

produced, and were made uſe of throughout the whole of the ſcrutiny; and that he (the witneſs) had the full uſe of them. The petitioner had made the want of a fair inſpection of the poor's rates, the principal ground of his demand of a ſcrutiny. It was not denied, that the ſitting member had opportunities of a free acceſs to them. The evidence of the conduct of the pariſh-officers in this reſpect, led to no determination of the committee [1].

Rule for the exclusion of witneſſes; agents;

Mr. Speck whom the petitioner intended to examine as a witneſs) having been named by him as an agent, was, according to the uſual practice, allowed to remain in the room during the trial. The evidence relating in a great degree to Mr. S.'s conduct at the election, it was ſuggeſted on the part of the ſitting member, that he ſhould not be ſuffered to remain in the room during that part of the caſe, but the committee were of opinion, that the privilege having been once allowed him, could not be retracted, if he deſired to remain in the room. Mr. Speck, however, voluntarily retired. Mr. Swan, a barriſter, being called as a witneſs, was objected to, as having been in the room. It appeared however, that it had been agreed, at the commencement of the trial, that he ſhould be at liberty to remain; but the chairman ſaid, that he had always underſtood that this privilege had been allowed to all gentlemen of the bar.

Barriſters.

NOTE (A) from p. 154.

The reporter has taken the liberty to ſubjoin the opinion of an eminent advocate upon a caſe ſtated to him ſome years ago, which contains a very able and elaborate ſtatement of the law, as it relates to the tender of votes at an election.

CASE.

The right of election for the borough of Leominſter, is in the bailiff, capital burgeſſes, and inhabitants, paying ſcot and lot.

[1] See note B. at the end of this caſe.

The election of members, to ſerve in parliament for this borough, came on 27th May 1796. John Hunter, Eſq. George Auguſtus Pollen, Eſq. and Robert Biddulph, Eſq. were the candidates. The borough of Leominſter is divided into wards, and the uſual way of taking the ſuffrages of the inhabitants is to call the names, each in rotation, as they ſtand in the poor's-rate. Previous to the poll being taken at the election, it was mutually agreed between the ſeveral candidates and their advocates, that the titles of diſputed votes, for either candidate, ſhould be ſcrutinized after the poll ſhould be taken on the unobjectionable voters. The ſuffrage of each voter was demanded by the town clerk aſking the perſon polling, after his title was admitted, for whom he voted? Thoſe whoſe title to vote was diſputed, were aſked by the town-clerk, "If you are admitted to vote, whom do you vote for?" and each anſwer was taken down on a looſe piece of paper, and not entered in the poll-book. It was agreed by all the candidates, that each voter had a right to alter his ſuffrage in favor of either, or both of the other candidates, againſt whom he firſt gave his voice, till his title was admitted: when each voter was re-examined as to his title to vote. None of thoſe whoſe titles were rejected by the returning officer, afterwards offered to tender their votes, or to give their voices in favor of either candidate. Thoſe on the ſcrutiny, whoſe titles were admitted, were each aſked (immediately on ſuch admiſſion) by the town-clerk, "Whom do you vote for?" And each voter's name was immediately taken down in the poll-book by the poll-clerk, and properly marked to the candidate in favour of whom he gave his ſuffrage.

You are deſired to anſwer the following queſtions:

Suppoſe (under the above circumſtances) thoſe voters, whoſe titles were rejected by the returning officer, on the ſcrutiny at the election, ſhall be eſtabliſhed in a committee of the Houſe of Commons, can their ſuffrages be taken in favor of thoſe candidates for whom they firſt gave their voices?

I am clearly of opinion that they may.

A perſon tendered himſelf to vote, who was objected to on the part of Mr. Pollen, and the objection ſucceeded. He was never aſked, nor did he ſay for which of the candidates he meant to poll. Should a committee of the Houſe of Commons be of opinion his vote was a good one, can his vote be added to the

poll

poll in favor of Mr. Biddulph, it not appearing for whom he meant to vote?

The firſt ſenſation which the ſtatement that gives riſe to this objection naturally excites, is one adverſe to the objection itſelf; inaſmuch as, according to all probability, it muſt have been perfectly underſtood, although not actually expreſſed at the time, for whom the vote was intended to be given; and the circumſtance of the queſtion not being put, probably aroſe only from the intention of the voter being ſufficiently apparent without any queſtion being put to aſcertain it. Beſides, it is to be obſerved, that it is not the omiſſion merely of the voter himſelf; for the caſe ſtates "he was never aſked the queſtion." Now as it is not uſual to declare for whom the vote is tendered, until the queſtion is put; it is clear, that in this caſe the omiſſion originated with the perſon taking the poll. We ſhall therefore have to maintain in a caſe where much may depend upon a ſingle vote *, that the vote in queſtion cannot be put upon the poll, upon the ground that the want of an expreſs declaration leaves it doubtful for whom the vote was intended: whereas, in point of fact, every member of the committee will be convinced no ſuch doubt exiſts, and, that if the queſtion had been put, the anſwer would have been in favour of Mr. Biddulph. It will therefore reſolve itſelf in the eſtimation of the committee into an objection of form, raiſed againſt the truth and juſtice of the caſe: an objection leſs likely to ſucceed before a committee of the Houſe of Commons than in courts more in the habit of regulating their deciſions by the ſtrict rules of the law; and in ſuch a caſe, it is plain, that the law muſt be clearly in favour of the objection, to enable it to prevail.

In the way in which the caſe is ſtated, I ſhould have little difficulty in giving a ſhort and direct anſwer, that the vote cannot now be eſtabliſhed. The queſtion put to me is, "can the vote now be added to the poll, *it not appearing for whom he meant to vote?*" To this I ſhould anſwer, certainly not; and upon the ground ſtated, that it does not appear for whom he meant to vote. But the caſe ſo ſtated begs the queſtion, for it aſſumes as univerſally true that it cannot appear for whom a perſon intends to vote, except by a declaration in words at the time; whereas I conceive the real conſideration to be, whether ſuch intention may not be evinced by other evidence, than actual declaration? and if ſo, whether there is evidence ſufficient for the purpoſe in the preſent inſtance?

* The election was determined by a majority of one upon the poll. See a note of the caſe, *poſt.*

I am not aware of any ſtatute that directs in what manner votes, when tendered and rejected, ſhall be diſpoſed of; the different ſtatutes relating only to the actual poll in caſes wherein a poll is clearly directed to be taken. Neither do I know of any caſe in which the preſent queſtion has ariſen, with the exception I ſhall preſently ſtate. Suppoſing the queſtion therefore to be determined in this reſpect on general principles, I conceive that caſes may exiſt in which an actual declaration would not be neceſſary; the nature of ſuch caſes need not be ſpecified, becauſe I am clearly of opinion, that the preſent is not one of the number, and for reaſons which I ſhall immediately give. But admitting ſuch caſes exiſt, they muſt all ſtand upon this general ground, *viz.* that there muſt be, by ſome means tantamount in point of proof to an actual declaration, a clear manifeſtation of the will of the perſon tendering his vote at the time of ſuch tender; in which caſe, the fact being eſtabliſhed, although the medium of proof ſhould differ, the difference would become immaterial. But this can only apply to very particular caſes, and does not apply to the preſent, becauſe I conceive all ſuch caſes muſt be conſidered as of ſpecial exception; the exception ariſing in this way, namely, that other evidence than actual declaration ſhall only be received in caſes where ſuch declaration could not poſſibly be made, or in which the omiſſion in making it is not in any degree to be imputed to the voter himſelf. The general principle applicable to the preſent point is, that that which ought to have been done, ſhall in point of law be conſidered as done. The utmoſt, therefore, that can be contended for in favour of a rejected vote, is, that at the moment of being rejected, the voter had done all that was neceſſary to be put upon the poll, which is equivalent to have been actually polled; but in this caſe the voter has not done all that was neceſſary, inaſmuch as he might have declared, and therefore ought to have declared, for whom he tendered his vote, and as he did not do this, and the omiſſion does not fall within any of the poſſible grounds of exception, I am clearly of opinion, that the vote cannot now be added to the poll.

I have already alluded to a poſſible exception to what I have already ſtated, *viz.* that I know of no caſe decided ſimilar to the preſent; and the caſe to which I alluded was that of Okehampton, at the laſt general election before the preſent, in which I underſtand the ſame objection was raiſed and over-ruled under the following circumſtances, as far as I have been able to collect them. The voters for the different candidates had, during the courſe of

the

the election, preſented themſelves on different ſides of the huſtings, and approached them through different doors: they wore reſpectively the colours of the different candidates for whom they meant to vote; and there being no doubt as to the intention of the voters objected to in the mind of any perſon preſent, candidate, counſel, or voter, the queſtion was in ſome inſtances neglected to be put, and in conſequence, an objection, preciſely ſimilar to the preſent, was afterwards raiſed before the committee. The votes were admitted; but from what I have heard, I conceive the objection was reluctantly made, and being made, not very ſtrenuouſly maintained; but at all events, had it been maintained to the utmoſt, and had the committee over-ruled it upon thorough deliberation, I can only ſay it is my clear opinion, ſuch a deciſion would have been illegal, and ought not to weigh with any ſubſequent committee. Of this deciſion we ſhall, however, probably hear much: what effect it may produce, it is of courſe impoſſible to eſtimate. I can only ſtate how, in my judgment, it ought to be treated, and this I have already done.

ROBERT DALLAS.

Lincoln's Inn, June 21, 1796.

NOTE (B) from p. 167.

By ſt. 17 G. 2. c. 3. ſ. 2. the overſeers of the poor are directed to permit every inhabitant of the pariſh to inſpect the rate, upon payment of one ſhilling; and to give him a copy of the ſame, or any part thereof, upon payment of 6d. for every 24 names. It this caſe it was ſaid, that the accounts for the pariſh of St. George not having been at the time of the election made up and audited, it did not appear, from the inſpection of the rate itſelf, who were excuſed, either totally or partially, the payment of their rates: the *memoranda* marked on the oppoſite ſides of the pages of the rate, not being conſidered by the pariſh-officers to be a neceſſary part of the rate, were withheld from the perſons who demanded inſpection on the part of the petitioner. It might perhaps be adviſeable to permit the candidate to enforce the attendance of one or more overſeers, with the poor's-rate, at elections where the right is in inhabitants paying ſcot and lot; in the ſame manner as the attendance of the clerk of the peace, with the land-tax aſſeſſments, is provided for in counties, by ſt. 20 G. 3. c. 17. ſ. 14.

After

Inſpection by order of the Houſe of Commons, or their Speaker.

After the petition had been preſented, the petitioner obtained an order from the Speaker, to be permitted to inſpect the poor's rates of the pariſh of St. George. A ſimilar order for inſpection of the books of the corporation of Liſkeard was granted to the petitioners appealing againſt the determination of the committee in 1803. See *ante*, p. 126. The caſe will be reported in the ſucceeding part of this volume. The reader, who is deſirous to ſee ſome inſtances in which the Houſe of Commons has exerciſed the power of granting inſpections, at the inſtance of parties to petitions of election, is referred to the following entries in their Journals.

10 Journ. 17. 2d February 1688. Leave was given to Sir John Stonehouſe (the petitioner,) or ſuch as he ſhould appoint, to have recourſe to all the poll-books, and other books and papers which are in the hands of the overſeers of the poor of the borough of Abingdon; and all other books relating to the election of a burgeſs to ſerve in the preſent convention, for the ſaid borough, and that he have copies of the ſame, if deſired. And that Thomas Medlicott, Eſquire, a member of this Houſe, ſhould have the ſame liberty.

10 Journ. 473. 17th November 1690. It was ordered that the books of the overſeers of Cirenceſter ſhould be left with the clerk of the Houſe, that the ſame might be inſpected by the parties concerned in the ſaid election.

23 Journ. 405. 14th December 1739. It was ordered, that the commiſſioner, and the clerk of the cheque of the dock-yard at Plymouth, ſhould permit the ſitting member to inſpect and take minutes of the muſter-rolls and books, wherein are contained the time of entry and diſcharge of all ſhipwrights, labourers, and other artificers, belonging to the ſaid dock. A ſimilar order was made upon the agent victualler, and clerk of the cheque of the victualling office.

25 Journ. 240. 15th January 1746 "Ordered, that the ſecretary to the commiſſioners of the cuſtoms do attend this Houſe upon Tueſday morning the 3d day of February next, and bring with him the order for appointment, and the appointment, of Mr. William Bedall, to be one of the ſurveyors-general, or inſpectors-general, of the cuſtoms, and the reports made by him the ſaid Mr. W. B. as ſuch; and alſo that he do, in the mean time, permit Luke Robinſon, Eſquire, who hath petitioned this Houſe, complaining of an undue election and return of a member" (Samuel Gumley, Eſq.) "to ſerve in this preſent parliament for the borough of Hedon, or his agents, to inſpect the ſaid order, appointment,

appointment, and reports, and take copies thereof if he ſee fit."

This authority is now exerciſed by the Speaker, by virtue of an order of the Houſe for that purpoſe, made upon reading each petition, and upon the day being fixed for taking the ſame into conſideration. In the firſt caſe under the ſt. 10 G. 3. c. 16 that order was not made till two days after the petition had been preſented.

33 Journ. 43. 5th December 1770. "The Houſe was moved, that the petition of Thomas Rumbold *, of Hill Street, Berkeley Square, in the county of Middleſex, Eſquire, which was preſented to the Houſe upon Monday laſt, might be again read;

"And the ſame being read accordingly,

"Ordered, that Hugh Roberts, the conſtable and returning officer for the borough of New Shoreham, in the county of Suſſex, do attend this Houſe upon Tueſday morning next, with the original poll taken by him at the laſt election, on the 26th day of November laſt.

"Ordered, that Mr Speaker do iſſue his warrant, or warrants, for ſuch perſons, papers, and records, as ſhall be thought neceſſary by the ſeveral parties, on the hearing of the matter of the ſaid petition of Thomas Rumbold, Eſq."

The practice now is, firſt to enter upon the journals the petition itſelf, then, the order for it to be taken into conſideration on a particular day, and laſtly, for the Speaker to iſſue his warrants, &c. The following is the form of theſe warrants.

FORMS

Of Speaker's warrants for witneſſes and papers required at the conſideration of election petitions.

No. 1.

For attendance of witneſſes.

Whereas by an order of the Houſe of Commons, the matter of the petition of , complaining of an undue election and return for is appointed to be taken into conſideration by the ſaid Houſe, upon the day of at of the clock in the afternoon.

Theſe are therefore to require you (and each and every of you †) to be and appear at the bar of the Houſe of Commons,

* See *ante*, vol. 1. Introd. p. 1.

† If two or more.

upon

upon the ſaid day of at of the clock in the afternoon, to receive and obey ſuch further order as the ſaid Houſe ſhall make concerning the ſaid petition:

As you will anſwer the contrary at your peril.

Given under my hand, this day of , one thouſand eight hundred and four.

C. A.
Speaker.

No. 2.

For the inſpection and production of public papers; but not compelling the attendance of any particular perſon.

Whereas by an order of the Houſe of Commons, the matter of the petition of, &c. &c. (as in No. 1.)

Theſe are therefore to require you , and ſuch other perſon or perſons who have in his, her, or their cuſtody or power (deſcription of the papers, &c. required, as the inſtructions are given) to permit the ſaid or his agent or agents, to inſpect the ſame, and take ſuch notes and copies thereof as he or they ſhall think fit:

And that you the ſaid , and the other perſons aforeſaid, or ſome one for you, do attend the Houſe of Commons, upon the ſaid day of , at of the clock in the afternoon, with all ſuch (deſcription of papers, *ſhort*) as aforeſaid, as the ſaid or his agent or agents ſhall require to be produced at the hearing of the matter of the ſaid petition:

As you will anſwer the contrary at your peril.

Given under my hand, this day of , one thouſand eight hundred and four.

C. A.
Speaker.

No. 3.

For the production of any private books or papers as deſcribed in the warrant, and compelling the attendance of the perſon to whom the warrant is directed.

Whereas by an order of the Houſe of Commons, the matter of the petition of &c. (as in No. 1.)

Theſe are therefore to require you and each and every of you to bring in your cuſtody (deſcription of papers, &c. required) and with them to be and appear at the bar of the Houſe of

of Commons, upon the ſaid day of , and to receive and obey ſuch further order as the ſaid Houſe ſhall make concerning the ſaid petition;

As you will anſwer the contrary at your peril.

Given under my hand, this day of , one thouſand eight hundred and four.

C. A,
Speaker.

No. 4.

When no committee has been choſen by ballot on the day appointed for hearing an election petition, the preamble of Speaker's warrants is in this form.

Whereas by an order of the Houſe of Commons, the matter of the petition of complaining of an undue election and return for the , was appointed to be taken into conſideration by the ſaid Houſe, upon the day of at of the clock in the afternoon.

And whereas the ſaid order hath from time to time been duly adjourned to ; Theſe are therefore to require you , and each and every of you, *forthwith* to be and appear at the bar of the Houſe of Commons, to receive and obey ſuch further order as the ſaid Houſe ſhall make concerning the ſaid petition;

As you will anſwer the contrary at your peril.

Given under my hand, this day of , one thouſand eight hundred and four.

C. A.
Speaker.

The ſelect committee, after its appointment, is empowered to ſend "for perſons, papers, and records," by ſt. 10 G. 3. c. 16. ſ. 18.

See the queſtions upon inſpection of court-rolls, &c. which aroſe in the caſe of Middleſex, *ante* p. 118. *et ſeq.*

CASE XXXV.

THE CITY OF DURHAM.

The Committee was appointed on the 8th of February, 1804, and conſiſted of the following Members:

Rt. Hon. Tho. Steele, *Chairman*,	John Dent, Eſq.
Tho. Davis Lamb, Eſq.	Hon Geo Cranfield Berkeley,
Cha. Mills, Eſq.	Sir Michael le Fleming, Bart.
Lord Geo. Thynne.	James Langham, Eſq.
Sir Tho. Theo. Metcalfe, Bart.	Jonathan Raine, Eſq. for the petitioners, } Nominees
Humphrey Sibthorpe, Eſq.	Lord Dunlo, for the ſitting Member, }
Walter Spencer Stanhope, Eſq.	
Rich. Archdale, Eſq.	
George Anth. Legh Keck, Eſq.	

Petitioners.	Electors.
Sitting Member,	Richard Wharton, Eſq.
Counſel for the Petitioners,	Mr. Wilſon, Mr. Ferguſon,
for the Sitting Member,	Mr. Adam, Mr. Hullock.

Petition.

THE petition[a] ſtated, that at the laſt election, Ralph John Lambton, Richard Wharton, and Michael Angelo Taylor, Eſquires, had been candidates, and that the two former had been returned; that the petitioners had voted for Mr. Taylor; that Mr. Wharton, by himſelf, and his agents, had been guilty of treating, bribery and corruption; and that his election was void.

Right of election.

The right of election is "in the major part of the mayor, aldermen, and freemen of the ſaid city, which ſhall be

[a] Preſented, 7th December 1802; renewed, 23d November 1803.

preſent

preſent at ſuch election." Admitted, 4th May, 1762. 29 Journ. 327 [b].

The evidence produced in ſupport of the petition was directed to prove, 1. the bribery of non-reſident voters in London, before the election: 2. that the reſident voters had been treated at Durham after the *teſte* of the writ: and 3. that 80 freemen had been carried down from London to Durham at the expence of the ſitting member, and maintained by him there; that they had received a ſum of money from him as an indemnity for the loſs of their time, and a further ſum to pay their expences back to London. The defence of the petitioner conſiſted in endeavouring to diſprove the two firſt of theſe charges, and to ſhew with regard to the laſt of them, that the money and conveyance afforded to the voters, had been no more than were neceſſary to enable them to exerciſe their franchiſe, and had not been given to them for the purpoſe of influencing their votes; and it was contended, that it was not illegal to provide theſe accommodations for them. The caſe being of this complex nature, and the committee having decided generally, that the election was void, no authority can be derived from their deciſion, with reſpect to the legality or illegality of the payment of the expences of out-voters by the candidate for whom they vote, eſpecially ſince the counſel for the petitioners not only inſiſted that they had proved direct bribery, and the treating of reſident voters, but alſo contended, that the proviſions and money diſtributed to the non-reſidents, were exorbitant and unneceſſary, and were, in fact, the conſideration paid to them for their votes. Since, however, the queſtion of law ariſing from this part of the caſe produced ſome new arguments on each ſide, a

Nature of the caſe.

[b] The right of ſending members to parliament was granted to the county palatine and to the city of Durham, by ſt. 25 Car. 2. c. 9. which enacts, that "the election of the ſaid burgeſſes from time to time, to ſerve in the high court of parliament for the city of Durham, ſhall be made from time to time by the major part of the mayor, aldermen, and freemen of the ſaid city of Durham, which from time to time ſhall be preſent at ſuch elections."—The creation of a great number of freemen in this city, for the purpoſe of voting at a particular election, gave riſe to the ſtat. 3 Geo. 3. c. 15. which is now generally called the Durham act.

ſhort report of them will be here preſented to the reader, together with a ſtatement of the principal facts proved in evidence, ſo far as they related to this point. For the general ſcope of the argument, and for moſt of the authorities cited, the reader is referred to the caſe of Herefordſhire, *ante*, vol. 1. p. 185., and to that of Berwick upon Tweed, *ante*, vol. 1. p. 401.

Expences of non-reſident voters.

It was proved, that ſeveral perſons reſiding in London had received, ſome time before the election, about 5*l.* each in advance from the agents of the ſitting member; that they had been conveyed at his expence to Durham ſeveral days before the election began; that in moſt caſes they had been maintained there by him at an allowance of 12*s.* 6*d.* a day, and were allowed 8*s.* a day for their loſs of time; and that they had received 7*l.* 13*s.* to pay their expences back to London. It is unneceſſary to trouble the reader with a further ſtatement of the evidence given, either in general or in particular inſtances, to ſhew, on the one hand, that the allowance was exorbitant and unneceſſary, or on the other hand, that it was only a reaſonable indemnity to the voter: ſince the preſent report is confined to the queſtion, whether or not the *bonâ fide* payment to an out-voter, of his expences, and for the loſs of his time, be legal or not? and in that view of the caſe, it was neceſſarily admitted on one ſide, and aſſumed on the other, that the payment was reaſonable and *bonâ fide*, and not corrupt or colorable.

Argument for the ſitting member.

It was ſubmitted as a propoſition on the part of the ſitting member, "that a *bonâ fide* allowance for travelling expences, ſubſiſtence, and loſs of time, is legal." The object of the ſtat. 7 Will. 3. c. 4. was to prevent a particular ſpecies of corruption, namely, the giving any entertainment by the candidate to the voters after the *teſte* of the writ, "in order to be elected." It is neceſſary that this corrupt purpoſe ſhould be proved, as a part of the offence; for the criminality of treating conſiſts in bribery. The ſtatutes 2 Geo. 2. c. 24. and 7 Will. 3. c. 4. are equally directed againſt bribery; and, as all offences againſt the former ſtatute (by a candidate) muſt alſo be offences againſt the latter, ſo *è converſo*, that which is not a violation of the ſtatute of

e the ſecond, is not a violation of the ſtatute of Wil-
The reſolution of the Houſe of Commons, 2d April
, declares treating to be bribery; if ſo, the treating
e corrupt; for otherwiſe, it could not be called by
me of bribery, which implies corruption. The ſt.
l. 3. has, manifeſtly, the ſame object as the reſolu-
f 1677; and the ſt. 2 Geo. 2. ſtill purſues the ſame
The title of the former ſtatute is, "for preventing
: and expence in elections:" the profeſſed object of
tter is, that all elections may thereafter be made
out charge or expence;" and it recites, "that the laws
f in being had been found by experience not to be
nt to prevent *corrupt* and illegal practices" in elections;
:ſtly alluding to the reſolution in 1677, and the ſtatute
lliam. It therefore ſuperadds to the forfeiture already
:d upon the candidate, heavy penalties upon all per-
ncerned in theſe corrupt and illegal practices. No-
:an more clearly mark the offence to which the ſtatute
lliam was meant to apply.

pril 1677. "Reſolved, that erſon hereafter to be elected ce for to ſit and ſerve in the f Commons for any county, n, port, or borough, after the he iſſuing out of the writ or election, upon the calling or ng of any parliament here-, after any ſuch place be-cant hereafter in the time of it, ſhall, by himſelf or by any his behalf, or at his charge, at before the day of his election, perſon or perſons having voice ſuch election, any meat, or ceeding in the true value ten the whole, in any place or at in his own dwelling-houſe ion, being the uſual place of for ſix months laſt paſt; or ore ſuch election be made and make any other preſent, gift, , or any promiſe, obligation, or engagement to do the ſame, either to any ſuch perſon or perſons in particular, or to any ſuch county, city, town, port, or borough in general, or to or for the uſe and benefit of them, or any of them, every ſuch entertainment, preſent, gift, reward, promiſe, obligation, or engagement, is by this Houſe declared to be bribery; and ſuch entertainment, preſent, gift, reward, promiſe, obligation, or engagement being duly proved, is, and ſhall be a ſufficient ground, cauſe, and matter, to make every ſuch election void, as to the perſon ſo offending, and to render the perſon ſo elected incapable to ſit in parliament by ſuch election: and hereof the committee of elections and privileges is appointed to take eſpecial notice and care, and to act and determine matters coming before them accordingly."

The queſtion therefore is, has the ſitting member incurred the penalties of the ſt. 2 Geo. 2. c. 24. ſ. 7 [d]? for if not, neither has he incurred the forfeiture of his ſeat, inflicted by the ſt. 7 Will. 3. It will be ſhewn, that neither committees, nor courts of law, have conſidered the payment of their expences to voters to be of itſelf an illegal or corrupt tranſaction. Such a deciſion, indeed, would deprive a large proportion of the electors in this kingdom of the exerciſe of their rights. When the ſtat. 25 Car. 2. firſt gave the elective franchiſe to the freemen of Durham, it muſt have been well known that many of them lived at a diſtance from that city; yet the right was not limited to the reſident freemen. Such a limitation however will take

[d] 2 Geo. 2. cap. 24. "An act for the more effectual preventing bribery and corruption in the elections of members to ſerve in parliament.

"Whereas it is found by experience that the laws already in being have not been ſufficient to prevent corrupt and illegal practices in the election of members to ſerve in parliament; for remedy therefore of ſo great an evil, and to the end that all elections of members to ſerve in parliament may hereafter be freely and indifferently made without charge or expence, be it enacted, &c. [ſ. 1. gives the form of the bribery oath, &c.]

ſ. 7. "And be it further enacted by the authority aforeſaid, that if any perſon, who hath, or claimeth to have, or hereafter ſhall have or claim to have, any right to vote in ſuch election, ſhall, from and after the ſaid twenty-fourth day of June, which ſhall be in the year of our Lord 1729, aſk, receive, or take, any money, or other reward, by way of gift, loan, or other device, or agree, or contract for, any money, gift, office, employment, or other reward whatever, to give his vote, or to refuſe or forbear to give his vote, in any ſuch election, or if any perſon by himſelf, or any perſon employed by him, doth or ſhall, by any gift or reward, or by any promiſe, agreement, or ſecurity for any gift or reward, corrupt or procure any perſon or perſons to give his or their vote or votes, or to forbear to give his or their vote or votes, in any ſuch election, ſuch perſon ſo offending in any of the caſes aforeſaid, ſhall for every ſuch offence, forfeit the ſum of five hundred pounds of lawful money of Great Britain, to be recovered as before directed, together with full coſts of ſuit; and every perſon offending in any of the caſes aforeſaid, from and after judgment obtained againſt him in any ſuch action of debt, bill, plaint, or information, or ſummary action or proſecution, or being any otherwiſe lawfully convicted thereof, ſhall for ever be diſabled to vote in any election of any member or members to parliament, and alſo ſhall for ever be diſabled to hold, exerciſe, or enjoy, any office or franchiſe to which he and they then ſhall, or at any time afterwards may, be entitled, as a member of any city, borough, town corporate, or cinque port, as if ſuch perſon was naturally dead."

place,

place, if the conſtruction of the law contended for by the petitioners ſhould prevail. In the caſe of Radnorſhire [e], the committee allowed the ſitting member to retain his ſeat although a diſtribution of tickets of the value of 5*s*. each, to each voter, was plainly proved; but the nature of that caſe was ſuch as to exclude every idea of corruption: an oppoſition being unexpected till the very moment of the election; neither was there any evidence of the tickets being converted into caſh, a circumſtance of great weight in the caſe of Herefordſhire [f], where, alſo, it was proved, that the voter who gave a vote for one candidate only, received from that candidate two tickets. Hitherto the queſtion has been, whether the allowance has been *bonâ fide*, or whether ſufficient evidence has been given, either of extravagance in the amount of it, or of an indiſcriminate diſtribution, or of other circumſtances of the like nature, to ſhew, that under the colour of ſubſiſtence and travelling expences, a bribe was given. Such was the caſe of Ipſwich, 1784 [g]; and ſuch was the doctrince laid down by Lord Mansfield in his ſpeech upon Lord Mahon's bill [h]. The caſes of Worceſter, 1775 [i], and Barnſtaple [k] in the laſt ſeſſion, and, in the courts of common law, the caſes of Smith *v*. Roſe [l], and Ridler *v*. Moore [m], ſupport the ſame conſtruction. In the caſe of Ribbans *v*. Crickett [n], the queſtion aroſe upon the proviſions furniſhed to the reſident voters after the *teſte* of the writ, the defendant having paid into court the amount of the ſum expended in treating the voters antecedently to the *teſte*, and the non-reſident voters. The opinion of the court, therefore, with regard to the non-reſident voters, was extrajudicial. Several actions at law for bribery have been brought in conſequence of the late conteſt for this city [o]. In all of them, the courts have drawn a diſtinct line between bribery and money given to the voters for the payment of their expences; ſuch payment

[e] *Ante*, vol. 1. p. 494.
[f] *Ante*, vol. 1. p. 186.
[g] 1 Lud. 81.
[h] 1 Lud. 67, 68.
[i] 3 Ld. Gl. 258.
[k] *Ante*, vol. 1. p. 90.
[l] Clifford, 371.
[m] Ibid. 103.
[n] 1 Boſ. and Pull. 264.
[o] See the caſe of Heward *v*. Shipley, 4 Eaſt's Reports, 181.

not being held to be within the bribery act. In the case of Wharton *v.* Lunn, at York, Mr. Baron Thomson, who tried the cause, told the jury, that if the money was given as a reasonable compensation for the loss of time and travelling expences, the statute did not apply; but, that they must be convinced it was not the colour for a bribe. In the case of Smith *v.* Sleigh, which was an action brought against a voter for asking 30*l.* to go to Durham, and 30*l.* to return, Lord Ellenborough stated the question to be, whether the sum was sought for as an indemnity for the voter's expences, or as a consideration for his vote: and that, in the former case, the voter was not an offender within the statute.

Argument for the petitioners.

The counsel for the petitioner argued upon this part of the case as follows.

Stats. 2 G. 2. and 7 W. 3. have different objects.

The whole foundation of the argument for the sitting member is, that the objects of the statutes of Will. 3. and Geo. 2. are the same. It is submitted, on the part of the petitioners, that they are entirely distinct from each other; the statute of William being intended to prevent charge and expence; that of George the second, to prevent bribery and corruption. It is admitted, that the resolution in 1677 was the basis of the statute of William; and from an attentive consideration of the resolution and of the statute taken together, and from a comparison of them with the statute of George the second, it will easily appear, that they do not differ from it less in their terms, than in their spirit and intent. The resolution in 1677 became necessary, in consequence of the increasing ardour with which a seat in the House of Commons was sought, and of the expence to which contending candidates submitted, in order to obtain it. From the time of Queen Elizabeth, as the power of that House increased and was more firmly established, illegal and unconstitutional means of being returned were multiplied. The resolution in 1677 limited the expence of the candidate to 10*l.*, (except what should be provided for the voters in his own house), and declared, that whatever was given beyond that sum, should be considered to be bribery. So the law stood, till the year 1696, when the treating act

was

was paſſed. The variations in this ſtatute from the reſolution in 1677 are very remarkable. The indulgence allowed to the candidate to treat the voters at his own houſe, or to treat them elſewhere to the extent of 10*l.*, was withdrawn, having been, probably, found to afford the means of evaſion. Where an expence of 10*l.* was allowed, it might be difficult to ſhew how much more than 10*l.* had been expended. The word "bribery," made uſe of in the reſolution, was purpoſely omitted in the ſtatute, in order that treating and bribery might not be confounded, and that the former might be known to be a ſubſtantive offence, independently of any corrupt motive which might, or might not, accompany the commiſſion of it.

In the next place, let the ſtatute of Will. 3. be conſidered, as compared with the ſtatute of Geo. 2., and there will be found to be the wideſt diſtinction between them. The title of the one is, "for preventing charge and expence in elections of members to ſerve in parliament;" of the other, "for the more effectual preventing bribery and corruption" in elections: in the preamble of the one, the miſchiefs complained of, are, "undue elections by exceſſive and exorbitant expences;" in that of the other, "that the laws already in being have not been ſufficient to prevent corrupt and illegal practices:" the ſtatute of William prohibits all ſorts of treating whatever, given to the voters after the *teſte* of the writ; the ſtatute of George the ſecond, prohibits bribery, at any time before the election, without adverting to the *teſte* of the writ. The ſtatute of William inflicts a puniſhment upon the candidate only, namely, the forfeiture of his ſeat; that of George the ſecond impoſes a pecuniary penalty upon all perſons whatever, who diſobey it. The conſtruction attempted to be put by the ſitting member upon the ſtatute of Will. 3. by conſidering it as directed only againſt bribery in particular circumſtances, would render it entirely nugatory and abſurd. Bribery, at all times, was an offence by the law of parliament, and a cauſe of the election being avoided: it would therefore have been abſurd to enact, ſuch being the law before the act, that bribery committed at a particular time ſhould incur the ſame con-

ſequence. The return of Mr. Foley for Bewdley was avoided for bribery in 1676, and Mr. Herbert, the petitioner, was ſeated in his ſtead [p]. If, according to the argument of the petitioners, the two ſtatutes apply to preciſely the ſame offence, and are to be conſtrued together, it follows, that the limitations of the ſtat. Will. 3. will control the general words of the ſtat. Geo. 2., and then, a candidate will be at liberty to commit bribery before the *teſte* of the writ, without being ſubject to any of the penal conſequences reſulting from the latter. It is therefore ſubmitted, that the act of Will. 3. had for its object to prevent any money or proviſion being given to the voter by the candidate after the *teſte* of the writ, without any exception in favour of voters in any particular circumſtances; and that the ſitting member, having, according to his own admiſſion, provided for the ſubſiſtence of a number of voters, and indemnified them by a payment of money for the loſs of their time, within the period limited by the ſtatute, has, in conſequence thereof, incurred the forfeiture of his ſeat.

With reſpect to the authorities cited on the other ſide, it having been ſhewn that the ſtat. 2 Geo. 2. has a diſtinct object from the ſtat. 7 Will. 3., upon which the merits of the caſe, in the preſent view of it, depend, it is only neceſſary to obſerve, that caſes decided upon the bribery act, have no relation to the preſent inquiry. It is not diſputed, that in order to recover the penalties under the ſtat. 2 Geo. 2. it muſt be ſhewn, that the bribe was offered, or ſolicited, for the expreſs conſideration of giving, or withholding, the vote; and that, if, in the caſes alluded to, the money, &c. appeared to have been given, or ſought, for other purpoſes, as for the conveyance or ſubſiſtence of the voter, the actions failed; although indeed, in caſes where not only ſubſiſtence

[p] 10th March 1676. 9 Journ. 397. Sir Thomas Meres reported, "that the chief matter on which the committee did ground their opinion, was, the bribery of Mr. Foley, to procure the voices of electors," upon which they reſolved (and the Houſe agreed in the reſolutions) that Mr. Foley was not duly elected, and that Mr. Herbert (the other candidate) was duly elected: and the return was ordered to be amended. See the caſe of Chippenham, 1691. 10 Journ. 638. cit. 2 Ld. Gl. p. 414.

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has been given, but alſo an indemnity for loſs of time, it ſhould ſeem that the voter muſt, in any view of the caſe, have been overpaid, ſince, probably, his time would have been employed in working for his ſubſiſtence. But in a caſe like the preſent, no queſtion ariſes upon the purpoſe for which the proviſion was afforded; ſince the ſtatute makes no diſtinction in that reſpect; and the terms of it are ſo plain, as not to be rendered more intelligible by any deciſion or authority. If an exception has been made upon any former occaſion in favour of out-voters, this committee will ſhun a precedent not authoriſed by law, and will adhere to the terms of the ſtatute: and if the law, as it is at preſent in force, operates as a grievance upon voters who live at a diſtance from the place of polling, that grievance ſhould be redreſſed by thoſe who have the power to alter the laws, and not by thoſe, whoſe only duty it is to adminiſter them. But the caſe of Herefordſhire is preciſely in point to the preſent queſtion; for there, corruption was not at all proved, or inſiſted upon, and the election was avoided entirely upon the ground of the voters having been treated. It may alſo be obſerved, that if the principle contended for by the ſitting member be the true one, namely, that a corrupt intent muſt be ſhewn to conſtitute an offence againſt the ſtatute of William, there is no diſtinction any longer between the caſes of reſident, and of non-reſident voters; for entertainments given to reſident voters, would alſo, upon the ſame principle, be innocent, if they were not given as a conſideration for their votes.

Deciſion of the committee.

The committee, on the 20th of February, determined the election of Mr. Wharton to be void.

Incidental points.

Incidental points.

Agency to be firſt proved.

At the cloſe of the opening of the caſe for the petitioners, the chairman intimated to their counſel, that the committee expected agency to be proved, before any acts of ſuppoſed agents were ſhewn in evidence.

General and particular agency.

It having been proved that a perſon of the name of Brand had been employed by the ſitting member, at Durham, to pay for the ſubſiſtence of the non-reſident voters, evidence was offered of ſome orders which he (Brand) had given reſpecting

ſpecting the employment, and payment, of certain reſident voters, in the intereſt of the ſitting member, as runners. This evidence was objected to. It was ſaid, that the proof of a particular authority, did not let in evidence of acts not within the ſcope of that authority; and the caſe of Fenn *v.* Harriſon, 3 Term Rep. 757. was cited [q]. In anſwer to the objection, the caſe of Ridler *v.* Moore, Clifford 371. was cited, in which the agency of the committee having been once proved, Lord Kenyon admitted evidence of acts done by individual members of it without the privity of the reſt, or of the candidates (the defendants [r].) In reply, it was obſerved, that, in that caſe, a foundation had been laid by ſhewing a general agency in the committee for all purpoſes of the election.

The committee deſired the petitioners to call further evidence of general agency: upon which they examined a witneſs who proved, that upon his ſhewing a bill to the ſitting member, which included charges both for the entertainment of non-reſident voters, and of ſuch reſident voters as had been appointed runners, the ſitting member, hearing that it had been incurred by Brand's order, told him that it ſhould be paid. The committee then permitted the petitioners to give evidence of the acts of Brand, as a general agent.

[q] In that caſe Mr. Juſtice Buller is reported to have ſaid, "there is a wide diſtinction between general and particular agents. If a perſon be appointed a general agent, as in the caſe of a factor for a merchant reſiding abroad, the principal is bound by his acts. But an agent, conſtituted ſo for a particular purpoſe, and under a limited and circumſcribed authority, cannot bind the principal by any act in which he exceeds his authority; for that would be to ſay that one man may bind another without his conſent."

[r] But ſee the caſe of Cirencester, *ante*, vol. 1. p. 467. See alſo Cricklade caſes, p. 135. Petrie *v.* Lord Porcheſter.

CASE XXXVI.

THE BOROUGH OF NEW WINDSOR, IN THE COUNTY OF BERKS.

The Committee was appointed on the 9th day of February, 1804, and conſiſted of the following Members:

Hon. Hen. Laſcelles, *Chairman.*
Hon. John Scott.
James Ferguſon, Eſq.
Hon. Edw. Laſcelles.
John Lubbock, Eſq.
Geo. Porter, Eſq.
John Fane, Eſq.
Hon. Rob. Curzon.
Hon. John Chapple Norton.
John Willet Willet, Eſq.
Fra. Burton, Eſq.
Sir Hen. Watkin Daſhwood, Bart.
William Baldwin, Eſq.
Cha. Dundas, Eſq. of Berkſhire, for the Petitioner,
Will. Sturges Bourne, Eſq. for the ſitting Members,
} Nominees.

Petitioner. Richard Ramſbottom, Eſq.

Sitting Members. John Williams, Eſq. Hon. Rob. Fulk Grevile.

Counſel for the Petitioner; Mr. Serjt. Lens; Mr. Conſt.
for Mr. Grevile: Mr. Milles; Mr. Reader.
for Mr. Williams: Mr. Adam; Mr. Newbolt.

THE petition[a] ſtated, that the ſitting members had been guilty of bribery and treating; and that the majority of legal votes was in favour of the petitioner, who ought to have been returned. Petition.

This borough affords a remarkable inſtance of fluctuating deciſions reſpecting the right of election, in former times: 8th Dec. 1640, it was determined to be in all the inhabitants; 2 Journ. 47. 6th July 1661, in the mayor, bailiffs, and burgeſſes, not exceeding 30; 8 Journ. 292. 5th April 1679, in all the inhabitants; 9 Journ. 586. 4th Nov. 1680, in thoſe only who pay ſcot and lot; 9 Journ. 646, 647. 2d Right of election.

[a] Preſented, 6th December 1802; renewed 25th November 1803.

May

May 1689, in the mayor, bailiffs, and ſelect number of burgeſſes, only; *nem. con.* 10 Journ. 118. 17th May 1690, a ſimilar reſolution of the committee was diſagreed to by the Houſe; 10 Journ. 419. 14th April 1715, the right was agreed to be in the inhabitants of the borough, paying ſcot and lot; 18 Journ. 62. 23d March 1737, the reſolution of 4th Nov. 1680 was read as the laſt determination of the Houſe; 23 Journ. 125.

Charge of bribery, &c. againſt a petitioner who has abandoned his claim to the ſeat.

In the trial of this petition one queſtion only of conſiderable importance aroſe. The petitioner, in the opening of his caſe, had abandoned his claim to the ſeat, and inſiſted only, that the election of one of the ſitting members, Mr. Williams, was void. Nevertheleſs, the counſel for Mr. Williams at the outſet of his defence, inſiſted upon their right to give evidence of acts of bribery and treating committed by the petitioner; and they relied upon the authority of the caſe of Coventry, *ante*, vol. 1. p. 99. They alſo argued as follows:

Argument for the ſitting member.

It is ſubmitted, that it is not only competent to the committee to receive this evidence in the circumſtances of the preſent caſe, but that they are bound to receive it, by their duty. The duty impoſed upon them is, to hear the whole matter of the petition; and by the law of parliament, the ſitting member appearing in oppoſition to that petition, has a right to lay before them any matter by way of recrimination againſt his antagoniſt. Not being allowed to petition, he is not confined, in proof, to any previous allegation, as the petitioner is, who cannot give evidence of matters not contained in his petition. In the caſe of Middleſex [b], a petition of certain electors was offered to the Houſe againſt the pretenſions of Mr. Mainwaring, who had been the unſucceſsful candidate at the election, and had himſelf petitioned againſt the election and return of Sir F. Burdett. The petition was ordered to be withdrawn, for it was ſaid, that the ſitting member, without a petition, was at liberty to prove any ground of diſqualification againſt the petitioner. Although the electors do not formally appear as parties

[b] See vol. 1. p. xxi. Introd.

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upon this occaſion, the committee are bound to take notice of their rights, and to put it out of the power of a candidate, who has already committed offences which diſqualify him to ſit for a particular borough, to offer himſelf a ſecond time to repreſent that borough. The ſtatute 7 Will. 3. c. 4.[c] applies to unſucceſsful as well as to ſucceſsful candidates, and ſhould it appear that the petitioner has offended againſt that ſtatute, he becomes incapable of ſerving in parliament for the place in queſtion, upon *ſuch election*; that is, either upon the original election at which the offence has been committed, or at any ſucceeding election to be holden in conſequence of the prior election being declared void. To this purpoſe the whole proceeding, until the ſeat is legally filled up, is conſidered as one election[d]. It was ſo conſidered in the caſe of Kirdcudbright: the petitioner, Mr. Gordon, was declared by a ſelect committee guilty of bribery at the election in 1780[e], and the election having been declared void, he was returned at the ſucceeding election: his opponent Mr. Johnſton[f], petitioned againſt him upon this ground, and, having given notice of his ineligibility to the electors, he was ſeated by the determination of the committee in 1782. So, where the ſitting member had been declared guilty of bribery, and having been an unſucceſsful candidate at the next election, petitioned againſt the return, the committee held that he was ineligible, and would not ſuffer him to proceed in the proof of what he had alleged[g]. The ſecond caſe of Southwark 1796[h], furniſhes an inſtance of the ſame perſon being returned upon a ſecond election, whoſe return upon the firſt election had been avoided on account of treating. The committee determined him to be

St. 7 Will. 3. c. 4. applies to unſucceſsful candidates.

Petitioner declared guilty of bribery, returned at the next election.

Sitting member declared guilty, &c. a petitioner upon the 2d election.

Sitting member declared guilty, &c. returned upon the 2d election.

[c] See vol. 1. p. 186.

[d] See 2 Ld. Gl. 411. and the caſe of Ilcheſter, *poſt*.

[e] See 3 Lud. 466. Mr. Gordon not only claimed the ſeat, but proved the majority of votes to be in his favour. The committee reſolved, "that it is the opinion of this committee that John Gordon, of Kenmore, Eſq. was guilty of bribery at the laſt election for the Stewartry of Kirkcudbright, and was therefore incapable of being elected." 2d March 1781.

[f] See 3 Lud. 481. 503. 505. 1 Lud. 72. *ante*, vol. 1. p. 500. and ſee p. 376. note p. In line 9, for ſitting member, *read*, petitioner.

[g] Caſe of Honiton, 1782. 3 Lud. 165.

[h] Clifford, 343.

ineligible;

ineligible; by which determination, the opinion of the committee in the caſe of Norwich 1787 [1] was over-ruled; and the committee, in the caſe of Canterbury 1797 [k], having followed the precedent in the caſe of Southwark, it is now generally underſtood, that by the common law of parliament, in caſes of bribery, and by the ſtat. of Will. 3. in caſes of treating, a candidate proved to have been guilty of either of thoſe offences, is incapable of being returned upon any election holden in conſequence of the preceding election having been declared void. From this it appears, that if the petitioner in the preſent caſe has been guilty of bribery or treating, thoſe offences render him incapable of being elected hereafter, ſhould the election in queſtion be declared void; and, that if he ſhould be returned, they would afford a juſt ground for petitioning againſt him. It ſhould therefore ſeem more proper, that this committee, to whom the merits of the firſt election are referred, ſhould pronounce their judgment upon the tranſactions which took place at that election, than that they ſhould leave them to be inveſtigated, for the firſt time, by a future committee. It will be ſaid however, that in the caſes cited, the reſolutions of the committee have been directed either againſt a ſitting member, or againſt a petitioner who had entitled himſelf to the ſeat; and that it has never been determined, before the late caſe of Coventry, that evidence of bribery, &c. could be admitted againſt a petitioner, who either had not claimed the ſeat in his petition, or, who having ſo claimed it, had afterwards abandoned it. It is not neceſſary, on the preſent occaſion, to inquire what the law may be, with reſpect

[1] 3 Lud. 455.

[k] Clifford, 358. In the ſecond Canterbury caſe, the electors petitioned againſt Mr. Baker and Mr. Sawbridge, in favour of Mr. Gipps and Sir J. Honeywood. Notice being proved to have been given to the electors, of the ineligibility of the two former, the two latter were ſeated; and 14 days were given to petition againſt their return. A petition was preſented, but was afterwards dropt. Clifford, 364. The committee in that caſe determined, "that the counſel for the late ſitting members be not permitted to bring evidence to diſqualify G. G. Eſq. and Sir J. H. Bart." p. 361. The ground of this determination might be, that theſe gentlemen were not, legally ſpeaking, parties before the committee, the petition being from certain electors.

to

to a petitioner who has only alleged the election of the ſitting member to be void, without claiming to himſelf the right to be returned [1]: but it is ſubmitted, that the petitioner, having in this caſe claimed the ſeat by his petition, is not entitled to abandon that claim, ſo as to withdraw himſelf from the conſequences of it. Since the ſtat. 28 Geo. 3. c. 52. ſ. 8. no petition can be withdrawn: it was intended, by the proviſions of that ſtatute, to prevent petitions being lightly, or vexatiouſly preſented: if they cannot be wholly withdrawn, they cannot be withdrawn partially; and although the petitioner cannot be compelled to offer evidence upon every allegation in his petition, ſtill, he cannot be permitted to expunge thoſe allegations from it. Since he has ſtated therein, that he is entitled to be returned, as having the majority of legal votes, it is competent to the ſitting member to ſhew that he is diſqualified from ſitting, by bribery; eſpecially, ſince the effect of that evidence not only regards the laſt election, but future elections, which may hereafter take place in conſequence of what has been proved at the preſent trial.

St. 28 G. 3. c. 52. No part of a petition can be withdrawn.

The following is the ſubſtance of the argument for the petitioner:

Where there is no claim of the ſeat, or where ſuch a claim having been made, is abandoned, the recrimination on the petitioner by the ſitting member, is no object of inquiry for the committee. The ſtat. 7 Will. 3. provides, that perſons guilty of certain offences at an election, ſhall be incapable to ſerve upon ſuch election, and that they ſhall be deemed to be no members of parliament, as if they "had never been returned or elected." It is plain, that this proviſion applies to thoſe only, who have been returned or elected, or who are entitled, in conſequence of having been

Argument for the petitioner.

Committee may inquire into bribery, &c. by ſitting members;

[1] See Clifford, 117. A witneſs was aſked in croſs-examination, concerning a tavern opened for the reception of the voters for the petitioner. This was objected to, as there was no allegation in the petition, that he ought to have been returned. The queſtion was permitted to be put; but it was obſerved by one of the committee, that this examination was to be proceeded in only ſo far as was neceſſary to try the credit of the witneſs, and not by way of recrimination.

elected,

elected, to have the return amended in their favour. It is ſubmitted, that the law of Parliament, with reſpect to bribery, is the ſame. The direct object, in the application of the law, is the ſitting member; incidentally, it may become neceſſary to inquire, whether a petitioner, who has entitled himſelf to the majority of votes, and who has therefore become, *de jure*, the ſitting member, is, or is not, diſqualified by treating or bribery, to retain his ſeat [m]. If he is ſo diſqualified, he is not *duly* elected; and the duty of the committee being to make a report to the Houſe if he were elected, his diſqualification forms a neceſſary ſubject of their inveſtigation. But the caſe is different, where, as in the preſent, the election and return of the petitioner are wholly out of the queſtion. Here, an inquiry into offences committed by the petitioner would be ineffectual, and any judgment of the committee thereupon would be nugatory. It cannot be pretended, that their judgment againſt him would prevent him from becoming a candidate, or from being returned, at a ſucceeding election. Were he returned, and petitioned againſt on the ground of his having been guilty of bribery, &c. at the firſt election, the committee appointed to try that petition muſt receive original evidence of the offence, and could not proceed upon the judgment of this committee [n]. No caſe, however, has yet been ſhewn, where evidence of treating at a former election has been held to diſqualify a perſon who had no right to be returned at that election. Even with reſpect to ſitting members, the caſes of Norwich [o] and Southwark are in oppoſition to each other; and it may, perhaps, ſtill be queſtionable, whether the words "upon ſuch election" are capable of the extenſive conſtruction which has been given to them. It has been ſaid, and it is admitted, that no counter-petition can be preſented againſt the pretenſions of a petitioning candi-

or petitioners who aſſert their right to the ſeat;

not by petitioners who only inſiſt upon a void election.

Whether treating at a former election diſqualifies an unſucceſsful candidate.

[m] See the caſe of Middleſex, *ante*, p. 31.

[n] See the caſe of Seaford, 3 Lud. 110. Kirkcudbright, 3 Lud. 467. Norwich, 3 Lud. 477. *Ante*, vol. 1 p. 376, 377. caſe of Hindon, 1777. *cit. ibid.*

[o] The committee determined in that caſe, "that the diſqualification by the ſtatute 7 and 8 Will. 3. c. 4., ſo far as the ſame relates to treating, is not proſpective to a future election." 3 Lud. 500.

date;

date; but that circumſtance does not affect the preſent queſtion. It is not denied, that the committee have the power to inveſtigate the pretenſions of the petitioner to ſit in parliament, provided the queſtion were, whether he ſhould ſit or not: but in this caſe, no ſuch queſtion ariſes. No proof has been given, or offered, to ſhew that he is entitled to be returned; and it is from ſuch proof, and not from the allegations of the petition, that ſuch a queſtion muſt ariſe. The object of the ſtat. 28 Geo. 3. c. 52. was not to compel the committee to take judicial notice of every fact alleged in the petition, but to ſecure ſome redreſs to the party petitioned againſt, in caſe of a frivolous and vexatious petition; and to prevent the Houſe of Commons being troubled with ſuch complaints. No argument can be drawn from that ſtatute, to prove, that it is not competent for the petitioner, at the trial, to admit that he is unable to eſtabliſh any particular allegation in his petition. The late caſe of Coventry, however, affords a deciſion upon the preſent queſtion, in favour of the ſitting member: but this committee will judge whether or not that deciſion is reconcileable to the law of parliament, and to the ſtat. 7 Will. 3. At preſent, it ſtands ſingle, and unſupported either by any preceding or ſubſequent determination; and although deciſions of former committees are entitled to the higheſt authority, and deſerve to be treated by ſucceeding committees with the ſame reſpect with thoſe of courts of more ordinary juriſdiction, yet, even according to the practice of thoſe courts, many deciſions have been over-ruled, which have been found, upon a more mature inveſtigation, not to be ſupported by legal principles.

Stat. 28 G. 3. c. 52.

Coventry, 1803.

The committee decided, that the evidence in recrimination might be received; and, after having determined (15th Feb.) that Mr. Grevile (againſt whom no proof appeared) was duly elected; and that neither Mr. Williams, nor Mr. Ramſbottom were duly elected; and that the election of Mr. Williams was void, they paſſed the following reſolutions:

Deciſion, and reſolutions of the committee.

"That it appears to this committee, that at the laſt election for the borough of New Windſor in the county of Berks, John Williams, Eſq. hath, by his agents, committed

acts of bribery and treating, whereby he is incapacitated to ſerve in parliament upon ſuch election.

"That it appears to this committee, that at the laſt election for the ſaid borough, Richard Ramſbottom, Eſq. hath, by his agents, committed acts of bribery."

The report was made to the Houſe 16th Feb. and ordered to lie on the table. No further proceedings took place in conſequence thereof, with reſpect to the latter reſolutions.

Incidental point.

Proof of agency.

A witneſs proved, that a houſe at Windſor belonging to a perſon of the name of Webb, had been opened about a week before the election, and that a number of the voters in the intereſt of Mr. Williams had been entertained there every day: that Mr. Cole, an attorney at Windſor, attended Mr. Williams in the town, previous to, and during, the election; accompanied him in his canvas; applied to the electors to give him their votes: and the witneſs added, that he appeared to be the agent for Mr. W., but ſtated no further facts than thoſe abovementioned: he further ſaid, that Mr. Cole had alſo paid to Mr. Webb the amount of the expence incurred in entertaining the voters at his houſe. The witneſs was then aſked, what paſſed in converſation between Mr. Cole and Mr. Webb, at the time when this money was paid? The queſtion was objected to; but the committee decided that it might be put.

CASE XXXVII.

THE BOROUGH AND TOWN OF WEYMOUTH AND MELCOMBE REGIS, IN THE CONNTY OF DORSET.

The Committee was appointed on the 10th of February, 1804, and conſiſted of the following Members:

W. Dickinſon, Eſq. *Chairman.*
Hon. Rich. Ryder.
Wm. Morland, Eſq.
Edw. Wilbraham Bootle, Eſq.
Anth. Hardolph Eyre, Eſq.
Wm. Melliſh, Eſq.
Tho. Rich. Beaumont, Eſq.
Geo. P. Holford, Eſq.
Edw. Hilliard, Eſq.
Albemarle Bertie, Eſq.
Cha. Smi h, Eſq.
George Cumming, Eſq.
John Whitmore, Eſq.
John Calcraft, Eſq. for the petitioner, } Nominees.
Benj. Hobhouſe, Eſq. for the ſitting Member, } Nominees.

Petitioner,	John Arbuthnot, Eſq.
Sitting Member,	Charles Adams, Eſq.
Counſel for the Petitioner:	Mr. Serjt. Lens, Mr. Serjt. Praed, Mr. Dampier.
for the Sitting Member:	Mr. Adam, Mr. Alexander, Mr. Wilſon.

THE petitioner[a] alleged, that the returning officer had received many perſons to poll for Mr. Adams who had no votes; and had rejected many legal voters who had tendered themſelves in favour of the petitioner: that the petitioner had the real majority, and ought to have been returned. The candidates returned were Sir James Pulteney, Mr. Steward, Mr. Garthſhore, and Mr. Adams[b]. Petition.

[a] The petition was preſented, 6th December 1802; renewed, 25th November 1803.

[b] Weymouth and Melcombe Regis were formerly diſtinct boroughs, and returned two members each. They were united by ſt. 13 Eliz. c. 9. (private act.) See D'Ewes's Journals, p. 554.

Right agreed, 1730.

The right of election in this borough was agreed before the committee of elections, 7th May 1730, to be "in the mayor, aldermen, bailiffs, and capital burgeſſes, inhabiting in the borough, and in perſons ſeiſed of freeholds within the borough, and not receiving alms[c]." This agreement does not appear to have become a laſt determination of the Houſe of Commons.

Statement of the right by the ſitting member.

As ſoon as the caſe of the petitioner had been opened, which conſiſted almoſt entirely in a charge of occaſionality againſt the freeholders in the intereſt of the ſitting member, the counſel for the latter remarking that there had never been yet any reſolution as to the right of election in this borough adopted by the Houſe, delivered in a ſtatement of a particular right for which they meant to contend, in the following words: "That the right of election in the borough of Weymouth and Melcombe Regis in the county of Dorſet, is in the mayor, aldermen, bailiffs, and capital burgeſſes inhabiting within the borough; and in perſons ſeiſed of entire freeholds within the ſaid borough, whether by deſcent, deviſe, or purchaſe, and not ſplit or divided unleſs ſplit by deſcent or deviſe; and not receiving alms."

Right not diſputed at the election.

It ſhould here be mentioned, that the right, as agreed on in 1730, had been acted upon at the laſt election, without diſpute, by each party: it alſo appeared, that the counſel for the petitioner had, at the election, objected to one or two voters for the ſitting member, who tendered their votes for divided tenements. The counſel for the petitioner profeſſed that they had not expected the right would be diſputed before the committee, and they delivered a ſtatement of the right in the terms of the agreement in 1730.

Statement for the petitioner.

Proceedings.

The committee determined, that they would firſt decide upon the right of election; and that the ſitting member ſhould firſt begin, and offer evidence in ſupport of his ſtatement. The foundation of this reſolution was, that the ſitting member, having at the election admitted the right, as agreed in 1730, it behoved him, in the firſt inſtance, to eſtabliſh his objections to it. The next day, it was ſubmitted

[c] 21 Journ. 574.

on

on the part of the petitioner, that although an agreement of the right by the candidates could not conclude electors who were not parties to it, yet the candidates, who in the preſent caſe were the litigant parties before the committee, having ſubmitted to it, and acted upon it, were concluded by it, and could not now be heard to object to it[d]: that at leaſt, ſome notice ſhould have been given to the electors, whoſe rights would be affected by it: that it was utterly impoſſible in this caſe, for the merits of the petition to depend upon a diſputed right of election, inaſmuch as both the candidates had ſtood upon the ſame right: and therefore, that the committee were not authorized by the ſtat. 28 Geo. 3. c. 52. ſ. 25. to require ſtatements[e], or to decide upon the right. It was anſwered on the part of the ſitting member, that although he had admitted the agreement in 1730 to contain the true right of election, he had not precluded himſelf from putting his own conſtruction upon it[f]; which was, that the freeholds therein mentioned muſt be entire freeholds from time immemorial, unleſs divided by act of law: that if this conſtruction were adopted by the committee, he ſhould be able to ſtrike off ſeveral of the voters for the petitioner, as having voted for tenements divided, ſince time of memory, by acts of the parties; it was therefore apparent, that the queſtion ariſing on this petition did, in part, depend upon a diſputed right of election. If the electors felt themſelves wronged by the deciſion of the committee, a remedy was provided for them, by way of appeal againſt it[g]. The committee, after a long deliberation, reſcinded the reſolution of the preceding day reſpecting the order in which the trial ſhould proceed, and required of the petitioner to prove the right as ſtated by him. They alſo reſolved, that the electors might appear by themſelves, or their counſel, before the committee.

Parties not concluded by agreement at the election, from conteſting the right before the committee.

Electors may be heard on the right of election, (though not petitioners,) where there has been no notice that the right would be conteſted.

[d] See the caſe of Chippenham, *ante*, vol. 1. p. 263. Mountain *v.* Adkin, *poſt*, note (A.) at the end of this caſe.

[e] They may require them, where they are of opinion that "the merits of ſuch petition do wholly or in part depend on any queſtion or queſtions which ſhall be before them reſpecting the right of election," &c. ſ. 25.

[f] For caſes of reſolutions, and laſt determinations explained, ſee 2 Heyw. 222—256.

[g] By ſt. 28 Geo. 3. c. 52. ſ. 26.

Evidence for petitioner as to right of election.

The evidence on the part of the petitioner conſiſted firſt, of the entries in the Journals of the Houſe, 3d June 1714. vol. 17. p. 664.

The following abſtract of them contains what is neceſſary for underſtanding the arguments, and the determinations of the committee in the preſent caſe.

Report of the committee, 1714.

A petition was preſented by four unſucceſsful candidates[h], praying for the return, and was referred to the committee, who made their report to the Houſe on the 25th of May 1714; but the Houſe being informed, that there were ſeveral reſolutions relating to the rights and qualifications of electors within the ſaid borough, which were not inſerted in the report, though they ought ſo to have been; ordered that the report ſhould be withdrawn, in order to the making the ſame more perfect[i]. On the 3d of June, the amended report was made[k]: it begins by ſtating the rights for which the parties contended, namely, in the mayor, aldermen, bailiffs, capital burgeſſes, and freeholders having a freehold in the corporation, as the petitioners alleged: but, according to the ſitting members, in the ſame perſons, with the addition of the recorder, and town clerk; it is added, however, that "the counſel on both ſides ſubmitted the right of election to be according to the determination of the Houſe of Commons in the laſt controverted election[l]; and did not further conteſt this point." Then the numbers on the poll are ſtated; and it is proved, that many voters for the petitioners came from diſtant places with conveyances juſt written, of which they would give no account; nor whether they were in poſſeſſion; nor whether the grantors had a freehold: ſeveral for the petitioners were ſplit votes, and from grantors who had only leaſeholds. The firſt ſplitting of votes for this borough, which began to be any ways notorious, was in Oct. 1710; in 1711 they went farther, and in this laſt election they went as far as (the witneſs thought) they could go, on all ſides: he believed the new votes on all ſides were of the ſame nature. There were upon the poll

[h] 3d March 1713. 17 Journ. 479.
[i] Ib. 648.
[k] Ib. 665.
[l] *Quære*, What determination of the Houſe is alluded to?

58 new votes for the petitioners, and 186 for the ſitting members. The witneſs could not tell how many of the petitioners' votes were bad, but he ſaid, that thoſe made in 1710 were of the ſame nature with thoſe made ſince.

"Then negative queſtions were moved; and, being inſiſted upon, were put, and paſſed in the negative; which, if thereby made affirmative reſolutions, are thus:

"Reſolved, that it is the opinion of this committee, that thoſe perſons who had no right of voting in the election of members to ſerve in parliament for the borough of Weymouth and Melcombe Regis, in the county of Dorſet, at Lady-day 1710, and not claiming by purchaſe for a valuable conſideration, or by will or deſcent, ſince that time, had a right to vote in the laſt election of members to ſerve in parliament for the ſaid borough [m].

"Reſolved, that it appearing to this committee, that divers ſcandalous and illegal practices have been lately carried on, in the borough of Weymouth, &c. to multiply voices in order to the laſt election of members to ſerve in parliament, it is the opinion of this committee, that all ſuch perſons, whoſe votes were not admitted at the determination of the laſt election in parliament for the ſaid borough, and who have not acquired a right by deſcent or deviſe ſince that time, had a right of voting in the laſt election of members to ſerve in parliament for the ſaid borough."

The petitioners then gave evidence to eſtabliſh 59 rejected voters, by proving their titles; and proceeding to ſtrike off 165 voters for the ſitting members, they proved that 14 of them had been treated [n]; but before they had offered any fur-

[m] Theſe reſolutions never ſhould be mentioned without the paſſage by which they are introduced; ſince the reader might not be aware that theſe extraordinary propoſitions are produced by the change of two negatives to an affirmative in ſuch a whimſical manner. Theſe two reſolutions had been omitted in the firſt report.

[n] It ſeems to have been underſtood in thoſe times, that a voter who had been treated, was diſqualified. See Steyning, March 20, 1711; the petitioner objected to all Lord Bellew's voters, as bribed or treated. Ib. Feb. 17, 1710, 30 objected to for bribery; 10 for treats. Boſton, 20th March 1711, four were excepted to by the ſitting member as being bribed; 27 treated; and five for bribery and treating others: by the petitioner, five for being treated, and two for treating.

ther evidence, the committee came to the following reſolution:

"That it is the opinion of this committee, that no freeholders of the borough of Weymouth, &c. made ſince the election of members to ſerve in parliament for the ſaid borough in April 1711, unleſs claiming by deviſe or deſcent, had any right of voting in the laſt election of members to ſerve in parliament for the ſaid borough."

Upon the 3d of May the committee met again, and came to this reſolution:

"That it is the opinion of this committee, that all conveyances to ſplit and divide the intereſt in any houſes or lands in the borough of Weymouth, &c. among ſeveral perſons, in order to multiply voices at the election of members to ſerve in parliament for the ſaid borough, are illegal and void."

The petitioners' counſel objected againſt 151 of the ſitting members' voters, as freeholders, made ſince the election in April 1711, not claiming by deviſe or deſcent, and bad votes. Then follow the names of theſe perſons.

On the 7th of May, the ſitting members inſiſted that none of the 59 perſons rejected by the mayor, ought to be added to the petitioners' poll, for that their deeds were fraudulent, no conſideration money having ever been paid, nor any poſſeſſion had under them; and they read from their notes the reaſons for which the mayor had rejected them; as, for deriving titles from leaſeholders, for other defective titles, for not producing their deeds, not giving any account of their freeholds, being ſplit votes; and among theſe were the votes of "Daniel Arden, junior, becauſe a ſplit vote, being part of the Golden Lion, for which his father had voted;" and of "Elias Reed, and Thomas Foſter, becauſe they were ſplit votes under Thomas Offett, who had voted."

The ſitting members proceeded to diſqualify 68 upon the petitioners' poll, and to eſtabliſh ſome of their own which had been objected to on the other ſide, and to prove bribery in the petitioners.

Then follow the reſolutions of the committee, that three of the ſitting members were not duly elected, and that

three

three of the four petitioners were duly elected. The fourth ſitting member had been admitted to be duly elected; and the committee had been diſcharged from proceeding upon the petition of the fourth candidate.

It is remarkable, that although the clerk of the crown was ordered to amend the return, it is not ſtated in the Journals, that the Houſe agreed with the committee in any one of the reſolutions.

The petitioner, ſecondly, gave in evidence the agreement, 7th May 1730, already mentioned. Agreement, 1730.

Thirdly, they called as a witneſs Mr. Manfield, who attended the poll for the petitioner, and who depoſed, that the agreement in 1730 had been read by the counſel for one party, and acceded to by the counſel for the other: on his croſs-examination he admitted that the counſel for the petitioner had objected to a perſon voting for a part of a houſe or tenement, another perſon having already voted for the other part, and that the voter had been rejected. Parole evidence.

It was attempted on the part of the ſitting member to prove, by evidence of uſage and reputation, that a tenement ſplit by the act of the parties ſince the time of memory, did not give a right to vote; but this evidence appearing to conſiſt in the declarations of perſons intereſted, was rejected by the committee. See this among the incidental points of the caſe. Evidence for fitting member.

The oral evidence of uſage having thus failed the ſitting member, his counſel argued in ſupport of the ſtatement delivered in by them; 1. from the law of parliament in general: 2. from the ſt. 7 & 8 W. 3. c. 25. ſ. 7.: 3. from the hiſtory of this particular borough, as it appeared from the entries in the Journals. Argument for fitting member.

The variety of the elective franchiſe is that which principally produces the complete repreſentation of every order and intereſt in the ſtate. It materially contributes to preſerve the independence of parliaments. The cauſe of it continues to be the ſubject of ſpeculation and conjecture; but certainly it was the effect of accident, not of deſign, nor was it introduced with any view to thoſe beneficial conſequences Advantage of the variety of elective rights.

Concurrent rights.

Freehold rights 1. ſimple. 2. qualified.

Where qualified, the number limited.

Eſtates ſplit ſince ſt. 7 & 8 W. 3. c. 25. do not give a vote.

ſequences to our conſtitution which were about to accrue from it. In the borough of Weymouth and Melcombe Regis the rights of the corporators, and of the freeholders of the borough, concur; an union, of which inſtances are alſo to be met with in other places *; the right of the freeholders only forms the ſubject of the preſent diſcuſſion. This right exiſts in ſome boroughs ſimply; in others, ſometimes combined with certain other qualifications and reſtrictions, as of value, of entirety, of antiquity, of certain ſervices due, of the nature of the eſtate, or of the duration of the intereſt; not to mention the right by burgage tenure, which may properly be ſaid to form a diſtinct claſs. Now it is to be obſerved, that in all the caſes where the reſtrictions of value, or entirety, or antiquity, are attached to the freehold, no more than a certain number of electors can exiſt; but where there is no ſuch reſtriction, any perſon although poſſeſſed of but a ſmall eſtate within the borough, may carve it out by legal, and even by ſincere and *bona fide* conveyances (for this is not a queſtion of occaſionality) to an infinite number of perſons, who thereby acquire a right of voting. It cannot be denied that this is a great inconvenience, tending to produce frauds and endleſs contentions; and it is therefore ſubmitted in the firſt place, that the reſtriction contended for by the ſitting member, is warranted and juſtified by the law of parliament in ſimilar inſtances; and by its own reaſon and convenience, inaſmuch as it renders ſuch abuſes impracticable. Moreover it is ſubmitted, that by the ſt. 7 & 8 W. 3. c. 25. ſ. 7 [p], the holders of eſtates that can be ſhewn to have been divided by the act of the parties

* See the argument for the ſitting members, in the caſe of Tewkeſbury, *ante*, vol. 1. p. 179. and the caſes there referred to. Wareham and Norwich may be added; the right in St. Alban's is not as it is there ſtated.

[p] "That all conveyances of any meſſuages, lands, tenements, or hereditaments, in any county, city, borough, town corporate, port or place, in order to multiply voices, or to ſplit and divide the intereſt in any houſes or lands among ſeveral perſons, to enable them to vote at elections of members to ſerve in parliament, are hereby declared to be void and of none effect, and that no more than one ſingle voice ſhall be admitted to one and the ſame houſe or tenement."

at any time ſince that ſtatute, are not entitled to vote[q]. It is not material to inquire, whether it be neceſſary to ſhew the entirety of the eſtate in the year 1696, when the ſtatute was made, or whether it be ſufficient to ſhew the entirety of it as far back as memory can reach; becauſe the latter proof would be ſufficient to raiſe a preſumption of its entirety ſince 1696, and long before, if it were neceſſary for the voter's title. The ſtatute having in the former part of the clauſe excluded the holders of the legal eſtate while out of poſſeſſion, and, 2. having provided againſt the fraudulent and occaſional multiplying of votes; 3. enacts, that "no more than one ſingle voice ſhall be admitted to one and the ſame houſe or tenement." It could hardly be meant that although only one perſon might vote for one tenement; yet, that if any perſon choſe to divide his tenement into a thouſand tenements, ſo many perſons might vote for them reſpectively, but no more. If this be the conſtruction of the act, it is difficult to ſay againſt what miſchief it was directed, or what inconvenience it was intended to prevent; but if not, then the only conſtruction which remains is this, that no vote ſhall be given for tenements divided ſince the paſſing of the act; for the words "one tenement," muſt either refer to what was one tenement at the paſſing of the act, or to what has become one tenement ſince that time, and it has already been ſhewn that they cannot refer to the latter, inaſmuch as that conſtruction would leave room for every poſſible extent of diviſion and multiplication, as much as if the ſtatute had never been made. And the conſtruction now contended for received the ſanction of the Houſe of Commons in the caſe of the borough of Whitchurch[r] 1708, wherein it was decided, that the right of election was in the freeholders only of lands or tenements, in right of themſelves or their wives, "not ſplit ſince ſt. 7 & 8 W. 3." It will be ſaid that the conſtant practice in caſes of county elections, affords an authority to ſhew that the

Whitchurch 1708.

Freeholds in counties.

[q] See the caſe of Haſlemere, 2 Ld. Gl. p. 327, &c. where this point was argued, but the committee did not come to a deciſion upon it: they, however determined in favour of the ſitting members, againſt whom the objection of ſplitting, &c. had been made. See alſo, 1 Heyw. 101. *ante*, vol. 1. 369.

[r] 21ſt December. 16 Journ. 52.

ſtatute

ſtatute does not apply to tenements fairly divided ſince the year 1696; but thoſe caſes are widely different from the preſent; the operation of the ſtatute has been relaxed in the caſe of counties, not only becauſe of the intolerable grievance which would have reſulted from a ſtrict application of it, but alſo becauſe the reſtriction in point of value which had been before attached to that right of election[s], prevented any evil conſequence from a relaxation in that particular inſtance. Although therefore, in one caſe, this relaxation might be called for by the great hardſhip which attended the ſtricter conſtruction, and might be juſtified and rendered ſafe by the operation of an additional reſtriction; yet, it does not follow that the ſame rule is to be adopted in another caſe, where neither the ſame hardſhip exiſts on the one hand, nor the ſame reſtriction operates on the other[t]. And indeed it ſufficiently appears from the ſtat. 10 Ann. c. 23. ſ. 1. that the fair diviſion of eſtates in counties was not conſidered as within the ſtatute of William; for the ſtatute of Anne, profeſſing to extend and enforce the proviſions of the former law with reſpect to the election of knights of ſhires, confines its penalties and prohibitions to fraudulent conveyances only, and in ſ. 2. requires a year's poſſeſſion in purchaſers for a valuable conſideration. It is remarkable, that both by this ſtatute and by the ſt. 13 G. 2. c. 20., and 19 G. 2. c. 28. relative to places that are counties of themſelves, the caſe of theſe freehold boroughs is not mentioned, but they are left to the full operation of the ſtatute of William.

10 Ann. c. 23. ſ. 1.

St. 13 G. 2. c. 20. 19 G. 2. c. 28.

Proceedings in the Houſe of Commons.

But the proceedings in the Houſe of Commons reſpecting this particular borough, ſhew, that there at leaſt it is neceſſary that the freeholds ſhould be entire, and that they ſhould have ſo continued from the paſſing of the ſtatute, or in other words, as far back as memory can reach within that time. It appears that the report of the committee in the year 1714 was firſt made on the 27th of May, and that it was referred back to them by the Houſe of Commons, in order that certain reſolutions of the committee, which had been omitted, might be inſerted. On the 3d of June the report was

[s] By ſt. 10 H. 6. c. 2. [t] See 1 Heyw. 99.

again

again brought up and read: it begins with ſtating the right of election as firſt alleged by each party, but adds, that they both ſubmitted "the right to be according to the determination of the Houſe of Commons in the laſt controverted election:" the determination, however, does not appear in the report of the trial of that election, which took place at the bar of the Houſe on the 12th, 18th, and 22d of May 1711; nor is there to be found in any other part of the Journals, any determination reſpecting the right of election in this borough. It is not unreaſonable to ſuppoſe, however, that this determination being paſſed not long after the deciſion in the caſe of Whitchurch already mentioned, and relating to a borough in ſimilar circumſtances, was of the ſame nature. However, it appears by the evidence, coupled with the reſolutions paſſed by the committee, that the ſplitting of freeholds was conſidered as a fundamental objection to the right of voting in the borough of Weymouth; it appears alſo from the evidence of Charles Langriſh, that his opinion of a good freehold was, that it ſhould be a *ſtatutable* freehold, adverting to the ſtatute of William, already obſerved upon. The reſolutions of the committee indeed, ſeem to connect the ſplitting of the freeholds with the purpoſe for which they were ſplit, namely, the multiplying of voices; but it already appears from the words of the ſtatute, that the undue multiplication of voices was rather the evil conſequence intended to be guarded againſt, than the eſſence of the act prohibited, which conſiſted merely in the diviſion of the eſtate. The exception of a diviſion by will, although not, ſtrictly ſpeaking, the act of law, is introduced into the ſitting member's ſtatement, becauſe it is found in the firſt reſolution of the committee in 1714. So in the caſe of Wareham[u], 19 Jan. 1747-8, the qualification of a year's poſſeſſion was diſpenſed with, where the freeholders had obtained their eſtates by deſcent, deviſe, marriage, marriage-ſettlement, or promotion to ſome benefice in the church.

Report, 3d June 1714.

Wareham, 1747.

Laſtly, it is ſubmitted, that by the proviſion of the ſtatute that only one perſon may vote for one and the

Freeholds muſt be entire.

[u] 26 Journ. 481.

ſame

ſame houſe and tenement, it is required that he who votes ſhould be in poſſeſſion of the whole of the tenement to which the right of voting was formerly attached; otherwiſe endleſs confuſion would enſue; for it would be impoſſible to determine to whom, of ſeveral owners of a divided eſtate, the right belonged. It is ſaid, indeed, by one of the witneſſes in the year 1714, "That Elias Read and John Foſter were rejected, becauſe they were ſplit votes under Thomas Offett, who had voted [w];" but it does not follow from thence that Thomas Offett's vote was admitted for only a part of the eſtate, ſince it is more probable that he tendered his vote for the whole. "Thomas Arden junior, was rejected, becauſe a ſplit vote; being part of the Golden Lion, *for which*" (i. e. the whole of which) "his father had voted."

Argument for petitioner.

Though the number limited, ſtill the freeholds need not be entire.

The counſel for the petitioner inſiſted, that even if the conſtruction contended for on the other ſide were right, and if only one vote could be admitted for what was one tenement in 1696, ſtill that would not exclude the vote of a perſon who tendered it in virtue of a tenement, although a part of it might have been alienated ſince the ſtatute; and that the queſtion of preference between two or more perſons entitled to portions of the ſame ancient tenement, was rather a point to be decided between the claimants as it aroſe, than the foundation of an argument for the excluſion of them all [x]. To the reſt of the arguments for the ſitting member they gave the following anſwer: It has been argued,

Freeholds multiplied to an extravagant degree, would ſhew occaſionality.

that the inconvenience of ſuffering freeholds to be multiplied *ad infinitum*, is much greater than any that can reſult from enforcing the neceſſity of preſerving them entire from time immemorial; but no ſuch inconvenience is to be apprehended; for it is obvious that there could be but one reaſon for multiplying eſtates to the extent ſuppoſed by the ſitting member, namely, the increaſing the number of votes: in which caſe the objection of occaſionality would apply to them. Any inconvenience which may ariſe from a *bona fide* diviſion of an eſtate, is ſuch as reſults from the law as

[w] 17 Journ. p. 666. col. 1. [x] See Chippenham, *ante*, vol. 1. p. 281.

it

it ſtands at preſent, and if neceſſary, muſt be remedied by new laws; for it cannot be contended that the ſtatute of William applies to tenements in being at the time of the paſſing of it, when the conſtruction invariably put upon it, both in counties and in other places, has been adverſe to that doctrine. In counties indeed, as it has juſtly been obſerved, an extravagant multiplication of votes is provided againſt by the reſtriction contained in the ſtatute of H. 6.; but as with reſpect to them, this is the only limitation which remains, ſo with reſpect to freehold boroughs, not being under the operation of that law, no limitation whatever exiſts, and the moſt minute eſtate will confer a vote, except, as has already been obſerved, ſo far as that minuteneſs carries with it very pregnant evidence of the fraud, or occaſionality of the grant. The fallacy of the argument drawn from the ſtatute of William, is, that it proves too much, in ſeveral reſpects: for, if the conſtruction was ſo clear as it is pretended, it would be impoſſible to deny that it would operate equally in counties, and other freehold boroughs; yet no inſtance has been produced in which ſuch an application of it has been even named, except in the ſingle caſe of the borough of Whitchurch. That caſe admits of two obſervations; firſt, that it ſtrongly partakes of the nature of burgage tenure; ſecondly, that conſidering the period in which the determination was made, (1708), it rather appears that the time of paſſing the ſtatute was taken as a convenient criterion of occaſionality, being the very year in which ſo ſtrong a law was made againſt it, than as a limitation ariſing from the enactment of the ſtatute itſelf: not to mention the ſmall weight due to a ſolitary caſe, in oppoſition to the unvaried practice of a whole century. Again, this argument proves too much; becauſe if true, every diviſion whether by act of law, or of the parties, ſince the ſtatute, muſt fall equally within its proviſions: the ſitting member, however, contends, that a multiplication, by the act of law, is valid; whereas the ſtatute makes no ſuch diſtinction: and even this diſtinction will not ſupport him throughout the whole of his ſtatement; for he ſets up an exception alſo in favour of deviſe, and marriage, which are acts of the parties.

Therefore

Therefore his ſtatement, as far as it is founded upon the ſtatute of William, according to his own conſtruction of that ſtatute, falls to the ground. The identity and entirety of the eſtate are not to be confounded with the reality of the qualification: for the ſtatutes, and laſt determinations, which require a certain length of poſſeſſion, (except in certain caſes, as of deviſe, deſcent, marriage, &c.) were made with a view to prevent occaſional and colluſive qualifications, not to preſerve the entirety of the freeholds, as ſtat. 10 Ann. c. 23. ſtat. 13 G. 2. c. 20. ſtat. 18 G. 2. c. 18. ſtat. 19 G. 2. c. 28.; and the caſe of Wareham 1747. The obſervation made on the part of the ſitting member, that the ſtat. of Anne was made to give vigor and effect to that of William, in the caſe of ſhires, ſtrongly ſhews, by a compariſon of the two ſtatutes, that the real ſcope of the latter was to prevent fraud and occaſionality, and not to limit the number of electors. The preceding words of the ſame clauſe, which are all directed againſt colluſive and occaſional qualifications, ſtrongly ſupport the ſame conſtruction. It is therefore ſubmitted, in the firſt place, that the ſtatute of William does not prohibit the fair diviſion of eſtates: and alſo, that if it does, the ſtatement of the ſitting member is in many reſpects inconſiſtent with it[y]. But, it will be found much more difficult to reconcile the agreement in 1730, and the proceedings in the Houſe at that time, with the ſtatement of the ſitting member, or with the argument he has raiſed from the ſtatute of William. For throughout the whole of that trial, and arduous conteſt, nothing is ſaid of the antiquity, or entirety, or identity of the freeholds. On the contrary, the cauſe wholly turned upon the fraudulent ſplitting, and occaſionality of the conveyances; and no proof whatever is given to ſhew what was an entire tenement in the time of King William. The committee indeed reſolved to ſtrike off all ſuch votes as had been ſplit ſince a certain point of time; but that was choſen in the year 1711, when ſuch a number of diviſions had taken place, and not from 1696: which evidently demonſtrates that they did not proceed

Agreement 1730.

[y] See the caſe of Peterſfield, 1727. 20 Journ. 859. 2 Heyw. 271.

upon

upon the ſtatute of William. They imputed the immenſe multiplication of votes which happened in the year 1711, to occaſionality, and on that ground they ſtruck them off, excepting only in thoſe caſes where the title accrued by deviſe or deſcent, which exclude the idea of occaſionality or fraud. Laſtly, they reſolved, that all conveyances made to divide the intereſt among ſeveral perſons 'in order to multiply votes,' was illegal, and void. No one can fail to obſerve, that the committee directed their whole attention to the manifeſt fraud of the caſe, and not to any particular right of election exiſting within the borough, and ſtill leſs to any ſuppoſed conſtruction of the ſtat. of W. 3. It is therefore ſubmitted, that nothing has been offered on the part of the ſitting member, either by argument or evidence, to impeach the right as agreed in 1714, and acted upon in the laſt election, namely, of the freeholders generally.

Determination upon the right of election.

The committee determined, "That the right of election for Weymouth and Melcombe Regis is in the mayor, aldermen, bailiffs, and capital burgeſſes inhabiting within the borough, and in perſons ſeiſed of freeholds within the borough, and not receiving alms."

Further proceedings.

This deciſion of the committee having been declared, the counſel for the petitioner proceeded to give evidence to diſqualify ſeveral of the ſitting member's votes for occaſionality. The ſitting member in his turn objected to many of the votes for the petitioner, upon various grounds, ſuch as leaſeholds, ſplitting, defective titles, &c. But in the event none of the particular votes were decided upon by the committee; ſuch a number of the ſitting member's objections being admitted to be clearly made out, as, together with ſome objected votes of the ſitting member, alſo admitted to be fully eſtabliſhed, gave the latter a decided majority. There remained for the determination of the committee ſeveral other votes of the petitioner objected to, and others of the ſitting member ſupported, on particular grounds, which muſt alſo have been diſpoſed of, before the objection of occaſionality to the recent conveyances by Sir W. Pulteney and others, could properly come in queſtion. As however, the former authorities upon this ſubject, and

Occaſionality.

particularly the late caſe of Okehampton, were moſt fully and ably diſcuſſed, the ſubſtance of the argument of Mr. Serjt. Praed for the petitioner, and of Mr. Adam for the ſitting member, is here added. But as it is merely intended to give the general view of the law taken on both ſides of the queſtion, it is not neceſſary to give a detail of any of the particular facts which were proved, and which gave riſe to many obſervations in the courſe of the argument, which alſo are omitted here. The reader will obſerve, however, that three claſſes of voters were objected to by the petitioner: one, of 8 perſons, whoſe eſtates had been granted to them by Sir W. Pulteney within 6 weeks of the election; the ſecond, of 6 perſons, to whom Mr. Williams had granted their eſtates between 6 and 8 weeks before the election; and the third, of 5 perſons, to whom Sir W. P. had granted their eſtates in 1790, at the eve of an election, when a conteſt was expected. The eſtate granted, was in general the reverſion expectant upon a leaſe for 99 years determinable upon three lives, to hold to the grantee, for the joint lives of the grantor and grantee.

Claſſes of voters objected to.

Argument for the petitioner.

Argument againſt occaſionality.

It is propoſed, on the part of the petitioner, to conſider this ſubject rather with regard to general principles of law, than to a multiplicity of decided caſes. The uſe made of the principal caſes which have been decided, will be rather to confirm thoſe principles than to decide the queſtion by the authority of the caſes themſelves; for whatever may be the value of precedents, reaſon is the moſt ſure and ſatisfactory guide and ground of law. The propoſitions ſubmitted are theſe:

1. There is, in the law of parliament, an objection, called occaſionality, entirely independent of, and diſtinguiſhable from all ſtatutory proviſions: and alſo from fraud.

2. By the term fraud, as it is here to be underſtood, nothing offenſive is inſinuated, nor any criminal or immoral intent imputed.

3. There are three ſpecies of fraud: 1. where a man pretends to have an eſtate, or other qualification, and has it not:

not: 2. where he apparently is in full poſſeſſion and enjoyment of it, but where, notwithſtanding, there is a ſecret truſt annexed to it, either expreſſed or implied, which does not leave him at full liberty to diſpoſe of it as he pleaſes: 3. where the eſtate is abſolute, but where a ſecret truſt is annexed to the vote: if the poſſeſſor of the eſtate has not the full power to diſpoſe of the vote, as well as of the eſtate, the vote is void. And it is immaterial whether the eſtate be obtained upon a ſecret truſt to vote in a particular intereſt at one election, or at all elections; the vote is void as long as the ſecret truſt continues; that is to ſay, the diſability ſtill accompanies the unlawful purpoſe.

Definition of occaſionality.

An occaſional voter is one "whoſe qualification, whether from eſtate, office, or other cauſe, is conferred or taken, for the purpoſe of voting at an election for a particular candidate, or in a particular intereſt."

The caſe of Suffolk, 1ſt April 1690[a], where it was complained that ſeveral hundred freeholders were made after the teſte of the writ, ſhews, that occaſionality was conſidered as an objection at common law; and the ſame appears from the caſe of Durham, 11th May 1762, where 215 freemen were ſtruck off the poll for having been made at the eve of the election, to ſerve certain purpoſes[a]. The time, however, makes no difference, nor whether the creation of votes took place before or after the teſte of the writ; theſe are circumſtances and proofs of occaſionality, but do not conſtitute the eſſence of it, which is the creation of the vote for a particular purpoſe. It was indeed argued in the caſe of Bedford 1775[b], that by the Durham act a limitation of time had been impoſed, and that no vote could be called occaſional which had been created above a year before the election; but the argument for the petitioners, drawn from the general nature of declaratory ſtatutes, abundantly anſwers that propoſition: there, however, it is admitted on all ſides, that no limitation of time exiſts, except where it has been impoſed by ſtatute; therefore in the preſent

[a] 10 Journ. 361.
[a] 29 Journ. 337.
[b] 2 Ld. Gl. 90.

caſe at leaſt, occaſionality is to be conſidered as it exiſted at the common law. The reſtrictive ſtatutes in other caſes did not repeal the common law, but added new force to it: it did not declare that what before was occaſional ſhould now be conſidered as ſincere, but that what might or might not be fair, ſhould, if done within a certain time, be *ipſo facto* deemed occaſional; making exceptions, however, in favour of thoſe caſes where occaſionality could not take place.

The qualification may be real, though occaſional.

It is plain that occaſionality compriſes, in ſome degree, an idea of reality: occaſional freeholders, freemen, or inhabitants, are ſtill freeholders, freemen, and inhabitants: it would be abſurd to call him an occaſional inhabitant who is no inhabitant at all. And in this appears the diſtinction between occaſionality and fraud; becauſe the latter is always oppoſed to reality: here alſo appears the diſtinction between the objection which ariſes from occaſionality, and that which is founded upon the ſtatute 7 & 8 W. 3. which is directed againſt the multiplication of voices, either, 1. by parcelling out ſeveral tenements to ſeveral perſons, or, 2. by dividing among ſeveral perſons the ſame tenements with that intent: for by the ſtatute, the eſtate itſelf, and not the vote, is declared to be void; he therefore, who votes in right of an eſtate ſo multiplied or ſplit, votes in right of ſomething which he has not, the very eſtate itſelf being diveſted from him by the purpoſe for which he obtained it: it follows likewiſe, that every title derived through ſuch a purchaſer would be defective, the eſtate being void in its firſt creation.

Nevertheleſs it has happened, that notwithſtanding this apparent diſtinction between fraud and occaſionality, theſe two terms have been ſo promiſcuouſly uſed by writers upon the law of elections, as well as by counſel who have argued upon theſe ſubjects before committees, that at laſt many have embraced the opinion that they are the ſame thing.

Mr. Serjt. Heywood ſays[c], that "except with reſpect to voters in burgage-tenure boroughs, every ſpecies of voters,

[c] Vol. i. p. 108.

(freeholders

(freeholders as well as others), plainly occaſional, and made *fraudulently* for the purpoſe of voting, were diſqualified by the common law;" which obſervation, it is apprehended, was not meant to be confined to perſons whoſe votes were occaſional, and whoſe qualifications were alſo fraudulent; ſince both in the caſe of Suffolk which precedes it, and of Petersfield which follows it, no objection ſeems to have ariſen to the voters objected to, from any defect or inſincerity in their eſtates, but only from the *occaſion* for which they had obtained them. It is probable that the want of attending accurately to this diſtinction has been the cauſe of ſeveral deciſions, in which committees have eſtabliſhed occaſional voters, becauſe they have not appeared to be fraudulent; it having been the conſtant object of thoſe who had the taſk of defending ſuch voters, to keep the attention of committees ſtudiouſly directed to the queſtion of fraud; and the fallacy of that mode of diſcuſſing the ſubject not having been ſufficiently adverted to. Many more inſtances might be given of this confuſion of terms beſides that already adduced; but it may be more uſeful to cite a paſſage in which the diſtinction is moſt accurately drawn, namely, in the ſt. 18 G. 2. c. 18. ſ. 5. which forbids any perſon to vote, 1. who has not been in poſſeſſion above 12 calendar months, (except, &c.) 2. whoſe eſtate has been made or granted to him "*fraudulently*, on purpoſe to qualify him to give his vote:" now it is plain that the firſt of theſe proviſions is directed againſt occaſional voters, impoſing, or rather enforcing, a limitation ſimilar to that of the Durham act, and the other ſtatutes already alluded to; deeming even a fair tranſaction (taking place within a limited time) occaſional, in order more effectually to prevent a creation of votes for election purpoſes; and as in a corporation, an occaſional freeman is not leſs a freeman than his fellows, ſo in a county, an occaſional freeholder is not the leſs a freeholder becauſe he obtained his eſtate in order to vote, provided his caſe does not come within the ſtatute of William; but in each caſe the vote is void. By the ſecond proviſion in the ſtatute of G. 2. fraudulent qualifications are forbidden and puniſhed, that is to ſay, qualifications that are fraudulent, 18 G. 2. c. 18.

not becauſe given on purpoſe to qualify, but becauſe the eſtate itſelf is not fairly conveyed: but if occaſionality and fraud are ſynonymous, either it muſt be a fraudulent thing to confer a corporate right, or to convey an eſtate fully and unreſervedly for the purpoſe of a vote, which is not pretended; or elſe it is not, nor ever was, occaſionality, to create any number of freeholders or corporators at the eve of an election, provided the titles given to them be perfectly ſolid and ſincere; a propoſition contradicted by all authorities. This difficulty cannot be ſolved but by confeſſing that fraud and occaſionality are diſtinct things; neither can the ſtatute of G. 2. otherwiſe be underſtood; for if the legiſlature was of opinion that there was no ſuch thing as occaſionality, except ſuch as conſiſted in fraudulent qualifications, why ſhould they divide their injunction, and impoſe diſtinct penalties on the ſame offence, under two names? Again, if ſimple occaſionality is no crime, why ſhould they have viſited the mere act of voting under a recent conveyance, which is but the evidence of occaſionality, with a puniſhment as ſevere, as the voting under a fraudulent qualification? And the latter part of the charge ſhews, that by a fraudulent qualification, was meant that by which the eſtate did not really paſs: for the *onus probandi* is caſt upon the voter; but it would be impoſſible for him to prove negatively that he did not obtain his eſtate with a view to vote.

To conſider, therefore, the queſtion of fraud ſeparately. This ſubject has already been divided into three parts; concerning the two firſt of which little needs to be ſaid, for no one will diſpute, that he who either has not really the eſtate, or holds it under a ſecret engagement to reconvey it, is neither a freeholder nor a voter; it is neceſſary to examine the third propoſition a little more cloſely; namely, that he who has the eſtate really conveyed, without any ſecret truſt by which his power of diſpoſing of it may be affected, but is, notwithſtanding, reſtrained as to his vote, by a ſecret truſt or engagement, expreſſed or implied, is not a legal voter. The caſe of Mr. Elphinſtone [d], in the Houſe of

[d] 3 Lud. 371.

Lords,

Lords, which contains much learning upon this ſubject, has more than once been cited by parties who were contending for very different propoſitions. The ſubſtance of it is this. The freeholders of the county of Renfrew had over-ruled certain objections made to the enrolment of the Hon. W. Elphinſtone. On appeal, the court of ſeſſion was ſatisfied that there was nothing in the objections made at the freeholders' court; but certain other objections, not there made, were taken in the court of ſeſſion; namely, "that the claim being founded upon a life-rent grant of ſuperiority of lands ſettled upon the grantor by a ſtrict entail, with the uſual prohibitory, irritant, and reſolutive clauſes againſt alienation," it had every appearance of being nominal and fictitious The court, liſtening to this ſuggeſtion, pronounced an interlocutor, by which the objection to his being enrolled was ſuſtained. From this interlocutor an appeal was brought to the Houſe of Lords, and Lord Thurlow, then Chancellor, delivered his opinion in ſupport of the judgment of the Scottiſh court. Taking the whole of it together, it may be ſaid to amount to this, that although the moſt diminutive eſtate, fairly obtained, gives a right to vote, yet that if the grant be coupled with any ſort of ſecret engagement, whether relating to the eſtate or to the vote, the whole tranſaction is fictitious and void. "I take the caſe," he ſays[c], "to be extremely clear, that by the law of Scotland, the eſtate which is pretended to be conveyed by theſe deeds, if it be a real eſtate, taken and enjoyed by the grantee, fairly and *bonâ fide, for his own uſe and benefit*, does give a vote for a member to ſerve in parliament." Now the only benefit which could be derived from the eſtate of which he was ſpeaking, was the vote itſelf; he therefore muſt have conſidered it neceſſary that the vote ſhould be at the abſolute diſpoſal of the grantee. He afterwards puts the caſe of an eſtate of 6d. a year, mortgaged for 10s. at 5 per cent. conveyed at the expence of 30l. and he conſiders it quite clear, that *ex facie* of ſuch a tranſaction, it would "be deemed an intentional evaſion of the law, upon the part of

Caſe of Mr. Elphinſtone.

[c] 3 Lud. 373.

the grantor and grantee." He gives the following reaſon for that opinion: "In[f] the caſe of ſuch a wadſet, my idea is, that it would be a fraudulent vote, though the voter had taken an eſtate ſufficient (as the law of Scotland ſays) for the purpoſe of voting. But as he has taken it in ſuch circumſtances as ſhewed that it was not calculated to ſerve *his own* purpoſes, therefore it would afford pregnant evidence of fraud." He proceeds to give his opinion, that if ſuch an eſtate were bought for the purpoſe of enjoying the franchiſe, that eſtate would convey the vote; but if it were held under an honorary engagement, "the moſt imperfect in point of actual obligation;" if it amounted only to a confidential vote; he holds it to be no vote at all. In the caſe of Mr. M'Pherſon[g], Lord Thurlow conſiders how a perſon would reaſon, to whom an offer of ſuch an eſtate, in certain circumſtances, ſhould be made; if he were inclined to ſerve the party, he would aſk no queſtions, but take his vote and poll; or elſe he would ſay, "if there is the leaſt degree of underſtanding that I am to vote for any candidate you may put up at the next election, from any notion of honour with regard to you, I will not take it." He then adverts to the difficulty of proving ſuch ſecret engagements; "but ſometimes," he ſays, "it may be underſtood from circumſtances: as many proofs as I can get, I will get; and what I cannot get at, I will not decide upon; but I will go as far as I can." Both in this caſe and the former caſe of Mr. Elphinſtone, the Houſe of Lords ſuſtained by their ſentence the opinion of Lord Thurlow, and decided that ſuch ſecret engagements might be inquired into, as objections to the validity of the eſtate. Upon this great authority it is ſubmitted, as to the third point in which fraud was ſaid to conſiſt, that a ſecret reſervation and engagement to vote, although exiſting only in the mutual underſtanding of the parties, is fraudulent, and deſtroys the vote.

1ſt claſs. To apply theſe obſervations to the facts of the preſent caſe. It is ſubmitted that the firſt claſs of objected voters fall, 1ſt, under the head of occaſional voters. They were

[f] 3 Lud. 379. [g] See the arguments on each ſide, in 2 Fra. 187.

made

made within ſix weeks of the election, and took their eſtates for no other purpoſe but to vote for the candidate whom Sir W. P. ſhould recommend to them. 2. They are fraudulent, for, all having been created by Sir W. P., it cannot be doubted that they conſidered themſelves under an engagement not to diſpoſe of their eſtates in ſuch a manner as would be injurious to his intereſts. It is equally clear that they conſidered themſelves bound by a ſimilar obligation in reſpect to their votes, ſo that they neither had their eſtate nor their vote for their own *uſe* and *purpoſes*. 3. They are within the proviſions of the ſtatute of W. 3. having been divided from the poſſeſſion of the ſame perſon, into the poſſeſſion of ſeveral, in order to multiply votes.

The ſecond claſs, of 6 perſons, made by Mr. Williams, are liable to the ſame objections. 2d claſs.

The third claſs, it is ſubmitted, are liable to the objection of fraud, if not of occaſionality. They were created in 1790, by Sir W. P. on the eve of an election, and in the expectation of a conteſt; and although the lapſe of time may be ſaid to have cured the occaſionality, yet it cannot get rid of the fraud, becauſe the honorary engagement ſtill continues; the vote is not yet free. 3d claſs.

The learned counſel then proceeded to remark upon caſes of particular votes, which for obvious reaſons are omitted here.

He concluded by obſerving, that the caſe of Okehampton [h], on which the ſitting member probably relied, differed from the preſent, inaſmuch as there, all the tenements had been proved to be ancient tenements, and the conveyances had been made in general a longer time before the election; but chiefly he ſubmitted to the committee, that as many of the arguments which he had made uſe of had not occurred to the gentlemen who argued the caſe of Okehampton, and as the caſe itſelf was very recent, and the queſtion of the greateſt importance, they would not conſider themſelves bound by it as an authority.

[h] *Ante*, vol. i. p. 359.

Argument

Argument for the ſitting member.

Argument for the ſitting member.

The counſel for the ſitting member denied the diſtinction taken by the other ſide between fraud and occaſionality, and inſiſted that there could be no occaſionality, except where fraud could be directly ſhewn.—The ſubſtance of the argument was as follows:

Fraud is never innocent.

The counſel for the petitioner has in his ſecond propoſition defined a ſpecies of fraud utterly unknown to the law, namely, innocent fraud. Such a palliation contains a contradiction in terms: it implies either a harſh conſtruction of an harmleſs action, or an excuſe for a guilty one: an act, ſo far as it is a fraud, is immoral and corrupt; when it ceaſes to be either, it is no longer fraud.

Occaſionality.

The deſcription given by the petitioner of occaſionality, deſcribes no offence according to the law of parliament. It is ſubmitted on the contrary, that there is nothing illegal in obtaining an eſtate for the purpoſe of giving a vote at a particular election, for a particular candidate, or in a particular intereſt, where no fraud appears; and moreover, that the circumſtances from which the petitioner argues that fraud as to the diſpoſition of the vote may be preſumed, do not raiſe that preſumption; and laſtly, that fraud never is, nor ought to be preſumed; but muſt be poſitively proved.

Fraud and occaſionality are the ſame.

As to the firſt of theſe propoſitions it is ſubmitted, that fraud and occaſionality are convertible terms: that they are uſed promiſcuouſly, and ſynonymouſly, has been admitted by the petitioner himſelf; and it will be ſhewn, that they are properly ſo uſed. In ſhires, before the ſt. 10 Ann., a freehold purchaſed at any time before the election gave a vote; the limitation impoſed by that ſtatute was meant to prevent the creation of fraudulent eſtates on the eve of an election. Before, a *bonâ fide* purchaſe within a year of the election, gave a vote; therefore ſuch a purchaſe muſt ſtill continue to give a vote, in places, where the ſtatute has no operation: otherwiſe a purchaſe, in ſhires, immediately before the commencement of the year of limitation, muſt be alſo held to be occaſional; which never has been ſo conſidered. No limitation whatever is impoſed, by common law, or by ſtatute, upon the conveyance of eſtates in the borough of Weymouth; the queſtion is therefore to be tried upon the

the fairneſs or fraud of each tranſaction; and the fraud is to be proved, not to be preſumed; whereas the petitioner reſts his whole caſe, as to the fraud, upon the preſumption, which he ſays ariſes from the recency of the conveyances, the nature of the eſtates, their minuteneſs, the ſituation in life of the parties, their connexion with each other, title deeds not produced, &c. &c.

Now if this queſtion involved any valuable or beneficial intereſt, the title to which was in diſpute, it could not be pretended, that theſe circumſtances would furniſh the ſlighteſt evidence againſt the grantee: why then ſhould they be ſo ſtrongly inſiſted upon as proofs of fraud, to deſtroy the right which a man has as well in the eſtate itſelf, as in the adjunct of it, namely the vote? which has already[1] been decided by this committee to be a valuable and a beneficial intereſt; and as ſuch to be a ground for excluding the teſtimony, and the declarations of the voter. At leaſt it cannot be denied that the elective franchiſe is an innocent object of deſire, ſubject to ſuch limitations, as are impoſed by law upon the purſuit of it.

The caſes of Mr. Elphinſtone and Mr. M'Pherſon, were indeed caſes of the utmoſt importance, whether conſidered with regard to the great authority of the perſon whoſe opinion has been cited, or to the time of the deciſion, or to the nature of the property from which the queſtion aroſe, or to the opinions formerly received. Votes in Scotland had been commonly created by an operation unknown to the law of England, namely, by paſſing away the eſtate from the grantor, in as many parcels as it contained 400 Scottiſh pounds; the uſufructuary intereſt being re-conveyed to the grantor, and the bare ſuperiority left in the hands of the grantee, who thereby became qualified to vote. Although ſeveral ſtatutes had been paſſed to forbid and prevent ſecret truſts, the court of ſeſſion had held (particularly in the year 1765) that it was not competent to receive evidence, and ſtill leſs, to examine the voter upon oath, as to any ſecret engagement or confidential truſt of his vote, under which he

[1] See *poſt*.

might

might hold the eſtate. Lord Thurlow attacked this ſeries of deciſions; but it is obſervable, firſt, that the point in queſtion was not, whether under certain circumſtances Mr. Elphinſtone or Mr. M'Pherſon had a right to their eſtates, but whether it was competent to the court of ſeſſion to purſue a particular ſcope of inquiry, as to the ſincerity of their qualifications? What the particular circumſtances in the caſe of Mr. Elphinſtone were, we are not preciſely informed; but one of them appears to have been, that he derived his eſtate from a perſon who had no power to alienate it. In the caſe of Mr. M'Pherſon the court of ſeſſion held it incompetent to receive any evidence upon the point; therefore it is impoſſible to foreſee either by what proofs the allegation of fraud would have been ſupported, or what the opinion of Lord Thurlow would have been, as to the effect of them. The judgment given upon the principal caſe, amounts merely to this: that it is competent to the court of ſeſſion to inquire into circumſtances of fraud, with reſpect to ſecret engagements as to the vote: but the opinion, as to what ſhall conſtitute an engagement, is founded upon ſuppoſed caſes, and is extrajudicial. Even that opinion, however, ſo far from ſupporting the doctrine contended for by the petitioner, is founded upon the ſuppoſition of a fraud proved, not preſumed; and of an engagement annexed to the eſtate, which is actual, though imperfect, as all fraudulent obligations are. He alſo ſpeaks of ſuch honourable engagements as defeat the legal right to an eſtate; but it never can be ſuppoſed that among ſuch engagements he included the particular inducements which a man might have to vote for a particular candidate. Theſe inducements are as various, as the ſprings of human action; and of different cogency, according to their different ſtrength; from a preference only one degree removed from indifference, to almoſt a neceſſity. Such are the habits of daily intercourſe, the ties of friendſhip, of conſanguinity, or of local intereſt; ſuch are alſo the memory of paſt ſervices, and of benefits conferred, which may be of ſuch a nature, and of ſuch a magnitude, as to leave the voter no freedom of choice, or power of refuſal, without a violation of the moſt ſacred duties.

ties. Nevertheleſs, the extent of the petitioner's argument goes to ſhew, that if a man, actuated by any of theſe motives, ſhould acquire a right to vote, with the purpoſe of exerciſing that right in favour of the perſon with whom he is ſo connected, not only the vote is void, but according to his interpretation of Lord Thurlow's opinion, and of his idea of honorable obligation, (as between the grantor and grantee) the title to his eſtate is null and void alſo. The parties to ſuch a tranſaction would likewiſe be held liable to an information for a miſdemeanor, according to a caſe in 2 Heyw. 344. 416. of the King *v.* Billinghurſt. But neither the opinion of Lord Thurlow, nor any other of the authorities cited, can fairly be ſtrained to ſupport ſuch a doctrine as this. Lord Thurlow in the firſt ſentence cited by the petitioner, ſanctions the purchaſe of a diminutive eſtate for the purpoſe of a vote. Conſequently, the circumſtance of the expence of the conveyance exceeding the value of the eſtate, could not be conſidered by him as *per ſe* a badge of fraud; and when he puts the caſe of wadſet, the circumſtances from which he infers fraud, are 1. the expence of the conveyance being paid by the grantor, (as it ſhould appear by his obſervation at the end of p. 380); and 2. the eſtate being redeemable at the will of the grantor: from which he concludes that it is held in truſt to vote as he ſhall direct. He ſays, that from ſome circumſtances fraud may be inferred, but he mentions none of thoſe circumſtances which are inſiſted upon by the petitioner, but others, which are fraudulent in their own nature, as a poſſeſſion at the will of the grantor; the conveyance at his expence; a valuable conſideration ſtated, but not paid; a ſecret truſt to reconvey; not to alienate; or, to vote according to the direction of the grantor: ſuch things contain pregnant evidence of fraud. Still referring to colorable grants, he adopts the definition of fraud given at the bar: *aliud agit, aliud ſimulat.* Does that definition apply to the preſent caſe? has any tranſaction been concealed by a falſe color? is any thing pretended which has not been done?

Further,

Further, to conſider other elective rights to which the petitioner inſiſts that the doctrine of occaſionality extends, will it be contended that before the ſt. 26 G. 3. c. 100. a perſon going *bonâ fide* to inhabit a borough at the eve of an election for the purpoſe of voting, had not a right to vote? The very preamble of the ſtatute gives an anſwer to the queſtion; it is directed againſt occaſional inhabitants, *i. e.* againſt perſons who were not really inhabitants, but who uſurped the franchiſe, under the colour of a temporary reſidence, kept merely for the purpoſe of the vote. So in the inſtance of corporate rights; except in the caſe of Durham 1762, which was an enormous abuſe of the power of admiſſion by the corporation, no inſtance can be ſhewn where at common law the vote of a perſon who had recently acquired his freedom for the purpoſe of voting, was ſet aſide; and nothing is more common than for perſons to complete their inchoate rights for the ſame purpoſes, even during an election. The propoſition that occaſionality conſiſts in a right ſincerely and *bonâ fide* acquired for the purpoſe of voting in a particular intereſt, involves the ſame abſurdities which have been already expoſed, when the ſame purpoſe was conſidered as a proof of fraud. The elective franchiſe is admitted to be a proper and laudable object of deſire; but why is it deſirable, except for the purpoſe of ſupporting the particular objects of the preference of the elector? A deſire to chuſe implies, for the moſt part, a preference already exiſting in the mind. But, ſays the petitioner, if you deſire to chuſe, that is fair and laudable; but if you deſire to chuſe A. or B., that is occaſional and illegal. You may ſettle in a borough, or become a freeman, for the ſole purpoſe of becoming an elector; but if you propoſe alſo to ſupport ſome particular intereſt, your vote is void. It is ſubmitted that this doctrine cannot be juſtified, either by the reaſon of the thing, or by the law of parliament; and that it is equally inapplicable to the caſe of freehold boroughs, wherein, there being no ſtatutory limitation either as to time or value, it neceſſarily follows, that an eſtate of whatever value *bonâ fide* obtained at any time previous to the election, for whatever purpoſe, confers a right

a right to vote. Therefore occaſionality does not imply reality, but implies fraud, which is directly its oppoſite: it does not conſiſt in a rightful title abſolutely obtained for a particular purpoſe, but it conſiſts in a particular purpoſe fraudulently ſought by colluſive means, and temporary expedients. It was on ſuch grounds as theſe that the 76 votes in the caſe of Okehampton 1791 [k], were contended to be illegal: the tranſactions were ſaid "to be colorable and fictitious, not ſubſtantial or real [l]." There were alſo inſtances of deeds redelivered after the election; and it was ſaid, that ſufficient appeared to induce the committee to conclude that all the conveyances were fraudulent, and vamped up for a temporary purpoſe. The committee agreeing in this opinion, rightly decided that the votes were occaſional and fraudulent, and ſtruck them off. But in the caſe of Okehampton, in the laſt ſeſſion, where no ſuch evidence of ſecret engagements appeared, the committee ſuſtained the votes of above 20 perſons, in ſituations preciſely ſimilar to the perſons whoſe votes are now in queſtion, and affected by ſuch evidence as that from which the preſent petitioner wiſhes to infer fraud and occaſionality. The conveyances were made for the joint lives of the voter and the ſitting member, under the direction of the attorney or agent of the latter: the propefty was divided from the poſſeſſion of one perſon into that of ſeveral: the freeholds were of no value whatever, except for the purpoſe of the vote: and the conſideration paid was greatly diſproportionate to any value that could be put upon the premiſes. No conveyances were earlier than two years before the election, and one ſo recent as within 6 weeks; and during the whole of the time a diſſolution of parliament was expected. The grantees were ſtrangers at Okehampton, and ſtrongly connected with the ſitting member; they had never ſeen their property, nor could give any account of it; in many inſtances they had received no rent. From all theſe circumſtances the petitioners inſiſted, 1. that the conveyances themſelves were colorable and fraudulent: 2. that the votes were void upon the ground

[k] 1 Fra. 102. [l] Ib. 115.

of

of occaſionality; but the committee were of a contrary opinion; ſince it did not appear that the grantee had not the full power to diſpoſe both of the eſtate and of the vote. So long as the voter might freely beſtow both as he pleaſed, it was not conſidered as a badge of fraud, that he acquired them with a view of ſerving his friend; that he treated the eſtate with all the neglect and indifference due to the poſſeſſion of ſo inſignificant a thing; nor that in the diſpoſition of the vote, he conſulted motives of intereſt, influence, or honor. This caſe, therefore, is fully in point to ſhew, that parliament looks to the reality of the title, the good faith of the contract, and the ſincerity of the conveyance; not to the particular motives which have induced the grantor to convey, or the purchaſer to obtain the eſtate.

St. 7 & 8 W. 3. c. 25.

Laſtly, it is inſiſted by the petitioner, that the eſtates granted in this caſe, are made void by the ſtatute of W. 3, having been ſeparated from the poſſeſſion of one perſon, in order to multiply voices. But it is ſubmitted, that this ſtatute, as well as the other laws already obſerved upon, muſt be taken to be directed againſt the multiplication of voices by fraudulent conveyances, not againſt the acquiſition of the elective franchiſe by the purchaſe of part of an eſtate: for if it were ſo, no eſtate divided ſince the paſſing of this ſtatute for the purpoſe of inveſting two or more perſons with the elective right, would have really paſſed to the grantees. But the ſtatute 10 Anne, c. 25. is the beſt legiſlative expoſition of the real ſcope of the ſtatute of William: reciting the clauſe alluded to of the preceding ſtatute, the preamble proceeds to declare, that (notwithſtanding this proviſion to the contrary) many *fraudulent* and ſcandalous practices had been uſed to multiply votes for ſhires; and to prevent them more effectually in future, it enacts, that all conveyances made "in a fraudulent or colluſive manner" to qualify any perſon to vote, ſubject to conditions to defeat or re-convey, ſhall be held abſolutely by the grantee. It is plain, therefore, that both the ſtatute of William and the ſtatute of Anne, were directed againſt the multiplication of voices by the creation of fraudulent and colluſive eſtates, whereby nothing was intended to paſs from the grantor; conſe-

quently the caſes which come within the definition of occaſionality given by the petitioner, do not come within the proviſions of either ſtatute; for it ſuppoſes the conveyance complete, and the eſtate abſolutely veſted in the grantee. The ſtatute of Anne alſo impoſes an oath upon the voter, that his eſtate has not been granted to him fraudulently on purpoſe to qualify him to vote; but if ſuch practices as the petitioner condemns, were held illegal, the oath would probably have been enlarged, ſo as to furniſh a ſecurity againſt them likewiſe. The ſame obſervation applies to the ſt. 18 G. 2. c. 18. The petitioner has obſerved, that the fifth ſection of that ſtatute diſtinguiſhes fraud from occaſionality, and viſits them both with the ſame puniſhment; and he has aſked, why, unleſs occaſionality be a crime, ſhould the legiſlature have impoſed a penalty for voting under a recent conveyance, equal to that for voting under a fraudulent conveyance? The anſwer is, that the voting under a recent conveyance is no crime; but the legiſlature, (as it has itſelf informed us) feeling the miſchief of fraudulent qualifications preſs moſt heavily on the eve of an election, impoſed this limitation as the beſt mode of preventing them; and then added this penalty, in order to give it effect. And it might be aſked in return, why did not the legiſlature extend this penalty to the obtaining an eſtate for the purpoſe of a vote, and to the dividing an eſtate for the purpoſe of multiplying votes, by ſincere conveyances; ſince theſe, according to the petitioner, are offences, by the law of parliament?

18 G. 2. c. 18.

The committee determined 23d Feb. 1804, that the ſitting member was duly elected: that determination was reported to the Houſe on the ſame day, together with their reſolutions upon the right of election, in the uſual form.

Deciſion and report.

Incidental points.

The ſitting member produced a witneſs to prove the reputation as to the right of election being in freeholders of entire tenements. It was objected, that before any evidence of reputation could be received, ſome fact muſt be proved to lay a foundation for that evidence; as for inſtance, that a voter had been rejected, becauſe the tenement for which he offered his vote had been ſplit. Upon this, the witneſs depoſed, that one Langriſhe had been rejected upon that

Evidence of Reputation.

ground at the laſt election; but it did not diſtinctly appear that he was rejected becauſe his vote had been ſplit ſince the ſt. W. 3. It was ſaid that this was hardly a ſufficient foundation for the evidence of reputation, becauſe it did not appear that this voter had been rejected according to the local uſage of the borough; for if he came to vote for a ſplit tenement, he was diſqualified by the general proviſions of the ſt. 7 & 8 W. 3. The committee determined that the examination ſhould proceed.

Hearſay of an intereſted perſon.

The ſame witneſs was then proceeding to relate what he had heard from a perſon of the name of Templeman, ſince deceaſed. Templeman had been a freeholder; and it was objected that his declarations tending to narrow the right to a few perſons of the ſame deſcription with himſelf, could not be received. It was anſwered that he was equally intereſted either way: if the freeholds muſt be entire, he partook of his privilege with the fewer perſons: if they might be divided, he poſſeſſed the power of communicating the privilege to whom he pleaſed. The committee rejected the evidence.

The ſame objection received a fuller diſcuſſion immediately afterwards: the next witneſs, Mr. Tizzard, was about to ſpeak of ſimilar declarations by another freeholder, (Mr. Strickland,) lately deceaſed; and this evidence was defended upon theſe grounds; that the intereſt which a voter had in the elective franchiſe, was not ſuch an intereſt, in the eye of the law, as would diſqualify him to be a witneſs: becauſe, it was contrary to law to put a value upon it, or to meaſure it by money: it was a privilege the enjoyment of which was not magnified, or impaired, by the communication of it with a few perſons, or with many: and the caſe of Dorcheſter, 1 Ld. Gl. p. 359. was cited, where a witneſs againſt whom the ſame objection was made, had been received by the committee; and the caſe of Cricklade, 4 Ld. Gl. 68, 69., where the ſame doctrine was held; it was alſo contended, (as in the caſe of Poole, 2 Ld. Gl. 273.) that no other evidence could be expected on ſuch a queſtion; becauſe the knowledge of theſe facts would probably remain with thoſe, and thoſe only, who were perſonally concerned in them. In anſwer to this, it was

ſaid,

ſaid, that the principle of admitting witneſſes *ex neceſſitate* had never been extended ſo far, as that a perſon ſhould be allowed to prove his own rights, becauſe no one elſe knew them; but that even this neceſſity did not exiſt in this caſe, becauſe if the freeholders of entire tenements could be proved to have enjoyed the right excluſively, other perſons might be called, who had been rejected. It was inſiſted that it was the intereſt of every elector to confine the right to the ſmalleſt number of perſons; that the elective franchiſe was not the leſs the ſubject of intereſt, and of value, becauſe it was not ſaleable; and that many other things were valuable, though not ſaleable; as an advowſon during the time of vacancy: that in this particular inſtance, the law had acknowledged the intereſt every man had in his franchiſe to be valuable, by giving a right of action to him who was diſturbed in it, and by confining the right of preferring petitions, to candidates, and electors only; *i. e.* to intereſted perſons. As to the caſes cited, it was obſerved, that the witneſs in the caſe of Dorcheſter united both the rights contended for by the litigant parties, in himſelf; a circumſtance not mentioned in the body of the report, but ſubjoined in a note [m]; it was probable, that the Cricklade committee underſtood the former deciſion as an authority for receiving an intereſted witneſs, and that being ignorant of the fact of his having been equally intereſted on both ſides, and therefore an indifferent witneſs, they had ſuffered themſelves to be governed by a deciſion, which, upon examination, appeared not applicable to the caſe then before them.

The committee determined, "that Mr. Tizzard is not at liberty to ſpeak with regard to what he heard Mr. Strickland ſay, he (Mr. S.) being intereſted." [n] Deciſion.

The vote of Iſaac Davis was objected to by the ſitting member. At the poll he had claimed to vote for premiſes in the occupation of one Lill, and his title deeds were produced before the committee. They were a leaſe and re- Evidence received of the voter's declarations againſt himſelf, after the election.

[m] Note D. p. 363. *ſed quære*; for his evidence went ſo leſſen the number of voters.

[n] See 3 Lud. 571. and the authorities referred to there.

leaſe, dated ſome years ago, by which the premiſes were conveyed to the voter. It was proved that Sir W. P. had received for theſe premiſes a ground rent of 6*s.* from one Jerrard ever ſince the year 1786, and that upon one occaſion, the rent not having been paid, his ſteward threatened to diſtrain upon Lill the occupier, who thereupon paid it. The ſitting member alſo offered to prove declarations of the voter, made within a few days, that he had bought a vote for Weymouth, but had never been in poſſeſſion of the property conveyed to him. This evidence was objected to, on the ground, that the declarations of the voter, after the election, ſhould not be received to prejudice the candidate who had now an intereſt in his vote, and was to be conſidered as a third perſon. 2. That the admiſſion of evidence ſo eaſily fabricated, tended to perjury. It was anſwered, that every thing that went to affect the voter's intereſt in the freehold, muſt neceſſarily affect the vote attached to it; and that the danger of perjury was an objection to the weight of the evidence, not to the admiſſibility of it. The committee, on the authority of 2 Lud. 411 & 569., admitted the evidence*.

A third perſon, who refuſes to produce his title deeds which affect a voter's title, need not diſcloſe their contents.

The ſitting member objected to the vote of W. Dearling, as being a leaſeholder for years. A notice had been given to him to produce all deeds, copies of deeds, writings, &c. relating to his title to the eſtate for which he had claimed to vote. A leaſe and releaſe were produced, by which Mr. Brown conveyed the premiſes to the voter in fee. In this deed was a covenant from Mr. Brown, to produce, when called upon, certain indentures of the date of the year 1788, by which he had purchaſed this eſtate among others, from Mr. G. There was alſo a covenant from Mr. Brown for the goodneſs of the title as far as concerned his own acts, and for quiet enjoyment againſt himſelf, and thoſe claiming under him. The ſitting member had ſerved Mr. Brown with the Speaker's warrant to appear and produce all deeds &c. in his cuſtody, relating to Dearling's eſtate. Mr. B. being called, and refuſing to produce his deeds, the ſitting

* See *contrà ante*, p. 141, 142.

member's

member's counſel propoſed to aſk him what intereſt had been conveyed to him by Mr. G. in this eſtate? (It appeared that Mr. B. was ſtill poſſeſſed of a part of the eſtate originally purchaſed by him, as above-mentioned.) It was objected by the petitioners, that Mr. B. was not bound to anſwer this queſtion, becauſe the anſwer might prejudice his own title; and that it was dangerous to permit ſuch inquiries into the titles of third perſons. It was anſwered, that the queſtion was confined to the eſtate of Dearling: that although the title were defective, he was not reſponſible to D. under the terms of the releaſe: and that therefore his own intereſt could not be affected by the anſwer he might give. That he was not only bound by his covenant to produce theſe indentures, but on this occaſion, was required ſo to do by the Speaker's warrant, which was of greater force than a common *ſubpœna duces tecum*, becauſe it extended to *all* papers, &c. That the ſitting member having done every thing in his power towards the production of a piece of evidence to which he had a right, was entitled to prove the contents of it, by ſecondary evidence; and laſtly, that the effect of excluding ſuch evidence, if Mr. B. was not compelled to diſcloſe his title, would be, that any man poſſeſſed of a long term, might convey freeholds for the purpoſe of making votes, without a poſſibility of the fraud being detected. The committee determined, that Mr. Brown was not obliged to anſwer the queſtion.

Committee refuſed to hear impeached the titles of voters, who might have been proceeded againſt by *quo warranto*.

The ſitting member propoſed to object to three perſons who had voted for the petitioner as capital burgeſſes. The facts, as ſtated in the argument, were, that theſe gentlemen had been elected about 20 years ſince, and had until lately exerciſed the franchiſe of a capital burgeſs. But previous to their election, the corporation had loſt one of its integral parts; the capital burgeſſes, a definite body of 24, being reduced to leſs than half their number. This defect had not been diſcovered till lately, and then gave occaſion to the caſes of R. v. Morris, and R. v. Stewart, 3 Eaſt, 213. 4 Eaſt, 17. when the Court of King's Bench were clearly of opinion that the corporation was diſſolved.

It was objected by the petitioner, that the committee ought not now to receive evidence to impeach theſe votes. That the voters had never been proceeded againſt by *quo warranto*, and it was a general rule, that where that had not been done, and there had been a ſufficient opportunity, a committee would conſider them good. That beſides, they were protected by the ſt. 32 G. 3. c. 58. for quieting titles to corporate offices. That although the corporation was incapable of continuing itſelf by elections, it was not abſolutely diſſolved; and the exiſting corporators preſerved their right of voting, as appeared from the caſe of Helleſton, 1775 [p]; and as the right (as it was ſaid) was ſtill exerciſed in the borough of Malden.

It was anſwered that this caſe differed from the caſes of Helleſton and Malden, becauſe there, the voters had been originally elected into a ſubſiſting corporation, which was afterwards diſſolved. Here the diſſolution was previous to the election; there was no corporation; therefore there could be no new corporators; no corporate right, or franchiſe, could be acquired; that although the diſcovery had not been made till long afterwards, ſtill the fact was the ſame; and the corporation had ceaſed to exiſt, from the moment the capital burgeſſes became leſs in number than a majority of 24: that although Lord Mansfield in the caſe of the Mayor &c. of Colcheſter *v.* Scaber [q], thought that a corporation ſo circumſtanced, might ſtill continue to do corporate acts, that doctrine had been departed from in latter caſes. It had been determined by the King's Bench in the caſe of R. *v* Saunders, 3 Eaſt [r] 119., that in ſuch circumſtances as information in the nature of *quo warranto* would not lie, there being in truth no ſuch office in exiſtence, as the defendant was charged with claiming: and although ſuch informations had been granted in R. *v.* Morris, and R. *v.* Steward [s], yet they had been granted only for the ſake of putting the facts into a courſe of trial. There had there-

[p] 2 Ld. Gl. 1.
[q] 1 Burr. 1866.
[r] See *ante*, caſe of Taunton, vol. 1. p. 409.
[s] 3 Eaſt's Reports, 213. and ſee ib. 4, 17.

forth

fore been no laches in the ſitting member, in not applying for a *quo warranto*, in a caſe which did not admit of ſuch an application. The ſame anſwer applied to the ſt. 32 G. 3. which was intended to protect officers in ſubſiſting corporations. There having been therefore no opportunity to attack the office claimed, nothing remained but to attack the vote given under it, which could only be done before this committee.

The Committee determined, that evidence ſhould not be received, to impeach theſe votes [t].

N. B. The ſitting member had two voters ſimilarly ſituated; but they had not been objected to by the petitioner. Probably the committee would have permitted him to avail himſelf of the objection, had his own votes been held bad. See *ante*, caſe of Chippenham, vol. i. p. 273, 282, caſe of Harwich, ib. p. 397. note [t].

Note (A), from p. 197.

The following note of the caſe of Mountain *v.* Adkin, Mich. 24 G. 3. B. R. has been furniſhed to the reporter by a gentleman of great eminence in the profeſſion of the law, by whom it was taken.

The reſident voter is competent to prove an agreement between the candidates that reſident voters only ſhould vote. *Quære*, if he be produced to prove the right itſelf.

This was an iſſue ariſing from an application to this Court for a *mandamus*, directed to try whether the plaintiff or the defendant had been duly elected curate of St. Andrew's church in Norwich. At the trial, the defendant offered to prove an agreement between the plaintiff and the defendant, not to admit the votes of any but reſident inhabitants; there having been ſome queſtion, whether out-voters, that is, perſons rated for houſes, but not dwelling within the pariſh, ſhould be admitted to vote. The witneſs propoſed to be called was a reſident inhabitant. Aſhhurſt J. who tried the cauſe, refuſed to admit him, and held him not to be a competent witneſs; the effect of his evidence being to narrow the right of voting, and to confine it to a ſmaller number, of which

[t] See *ante*, Harwich, vol. i. p. 386. note A. p. 479. 393. Eaſt Retford, ib. p. 477. and

he was one; and conſequently, to render his own vote more valuable. A verdict having been given for the plaintiff, a rule was obtained on the part of the defendant, to ſhew cauſe why there ſhould not be a new trial. Mr. Bearcroft and Mr. Partridge ſhewed cauſe againſt the rule, and Mr. Graham argued in ſupport of it.

Lord Mansfield, C. J. This is a queſtion merely between the two candidates. There are no other parties. The plaintiff contends that the right of voting is in all the pariſhioners, whether reſident or non-reſident; the defendant, that it is in the reſident voters only. The defendant does not rely on the effect of the evidence given, but on that which was offered, and which, it is ſaid, would have proved an agreement made between the parties on this occaſion to exclude the votes of non-reſidents. I own I have conſiderable doubt whether the witneſs, notwithſtanding the objection which has been ſtated, was not ſtrictly competent. The objection as to the competency of witneſſes has been carried in our law to an extravagant extent. It is founded on a ſubtilty, which it has been at laſt found neceſſary in many caſes to meet with an equal ſubtilty, by which a witneſs is allowed to be made competent by a releaſe, although it be clear, that the next day he will be replaced in that right which he has relinquiſhed only for the occaſion. The trifling intereſts of freemen and commoners are allowed by this artifice, to be removed, for the purpoſe of letting in their evidence. The authorities which reſpect the competency of witneſſes muſt be adhered to; but I am unwilling to draw the line tighter. I have heard Lord Hardwicke frequently ſay, that where the objection to the competency ariſing from intereſt was doubtful, it was better to leave it only as an objection to the credit. R. v. Bray, Mayor of Tintagel, 10 G. 2*. When the preſent objection was firſt made, I thought it had weight in it; but on further conſideration it appears, that the witneſs was not called to prove any right in himſelf, which could be uſed on a future occaſion, but merely an agreement between the parties in reſpect of this particular election. This agreement would, in future, afford an argument that the right was not ſo confined; ſince it was only by ſpecial agreement that the out-voters were to be excluded. From all the evidence, I doubt whether ſuch an agreement was made; but that is not now the queſtion. Mr. Bearcroft ſays, that the law requires a witneſs to come without a wiſh; but that certainly

* Reported, Cas. temp. Hard. 358. P. 290. And ſee the authorities cited There is alſo a note of it in Buller's N. Caſ. temp. H. 361.

is

s not ſo; the neareſt relations, the moſt active and ſanguine friends and agents are by law competent witneſſes.

But I am ſatisfied, that in this caſe there ought not to be a new rial, becauſe it appears from the evidence which was entered nto, that the defendant himſelf relinquiſhed the poll; and it hall not be endured now, that he ſhall diſpute it, having, by his leclining before the hour, prevented any more votes from being aken.

Willes, J. agreed with Lord Mansfield as to the inconvenient legree of ſtrictneſs to which the old law carried the line of the ncompetency of witneſſes; and ſaid, that where the intereſt was ery ſmall, the rule *de minimis non curat lex* ought to be allowed; nd that the teſtimony ſhould be admitted, being left open to the queſtion of credit. He agreed on the other points, and added, hat under the circumſtances of the preſent caſe, the franchiſe having been exerciſed at the time the witneſs gave his evidence, here was no longer any bias upon him.

Aſhhurſt J. I readily acquieſce in the preſent determination of the court, and I agree, that the ſtrictneſs complained of required relaxation; but at the trial I thought that, whether the intereſt which the witneſs had was permanent, or only *pro hâc vice*, it was a difference in degree only, and not in kind. But on the other ground, I think there ought not to be a new trial.

Buller J. The rule adopted by Lord Hardwicke has been followed by all the Judges; but it applies only in caſes where the intereſt is doubtful. In other caſes, it is equally clear, that if the intereſt be direct, it matters not how ſmall it is; the witneſs is incompetent. The court cannot calculate the conſciences of men, and ſay, that what would be an intereſt to influence one man, would have no effect upon another. The rule, therefore, cited by Willes J. is not applicable to the queſtion.

The election was over at the time when this witneſs was produced to give his evidence; whether this agreement ſubſiſted or not, it was temporary only, and no future right was to be decided by it; ſo that there remained no cauſe of influence at the time.

But in my opinion there ought to be a new trial. What the effect of the evidence would have been, if produced, is not known; the whole caſe has not been before the jury, nor is it now before the court. The reſignation of the defendant is not deciſive in this caſe. The rule *ex ore tuo*, applies to caſes where the parties alone are intereſted. In elections of members of parliament, or of corporate officers, the candidates cannot reject voters, or make rules to bind the electors; and although this is not an office which

a man can be obliged to accept, yet he cannot ſtop the poll, and let in a perſon who has a minority of votes againſt the will of the pariſhioners; for it would be eaſy, by ſuch a colluſion, for perſons to agree that a particular candidate ſhould be returned, who, without ſuch a contrivance, would not have a majority of votes. At moſt, there would be a neceſſity for a new election; for if it were now neceſſary for a *mandamus* to go, how is the conſcience of the court informed, which candidate had the majority? I therefore think there ought to be a new trial.

Lord Mansfield obſerved, that in this caſe the electors had made no application; if they had, the queſtion might be different, but he had no doubt that it was a queſtion merely between the two candidates, and that there ought not to be a new trial.

Rule diſcharged.

END OF VOL. II. PART I.

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ERRATA.

Vol. I.

In Page xiv. Introduction, *for* Caſe of Cirenceſter, *read* Borough of C.
xxxix. l. 25. *for* Jan. *read* Jun.
312. l. 16. *for* eight, *read* twelve.
327. l. 13. *for* attends, *read* attend.
376. note *P.* l. 9. *for* ſitting member, *read* petitioner.
l. 15. *for* the ſame ſitting member, *read* the ſame perſon returned upon the ſecond election.
500. l. 23. *for* re-elected, *read* elected.

Vol. II. Part I.

In Page 149. *for* Mr. Weatherall *read* Mr. Wetherell.

CASES

OF

CONTROVERTED ELECTIONS,

IN THE

SECOND PARLIAMENT

OF

THE UNITED KINGDOM:

BEGUN AND HOLDEN 31 AUG. 1802;

DISSOLVED 24 OCT. 1806.

By ROBERT HENRY PECKWELL,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

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PREFACE

TO

THE SECOND VOLUME.

THIS ſecond volume is now ſubmitted to the public, containing a Report of the Caſes of Controverted Elections referred to ſelect committees of the Houſe of Commons, during the ſecond, third, and fourth Seſſions of the late Parliament; all the caſes that were tried during the firſt Seſſion, having been reported in the former volume. Without at all adverting to the merits or to the demerits of this work, it may ſafely be aſſerted, that in no former Parliament have points of higher importance ariſen, or been diſcuſſed with more learning and ability, or determined with greater conſideration, wiſdom, and integrity. The author, therefore, conſiders it as no ſmall advantage to himſelf, that it has fallen to his lot to communicate the knowledge, and perpetuate the memory, of theſe trials: but ſince, if theſe reports ſhould not be found, in the event, to be of great utility, it can be imputed to nothing but to his imperfect uſe of ſuch excellent materials; he feels

conſiderable anxiety in the publication of a work, the ſucceſs of which may be attributed to ſo many cauſes, but its failure, to one only.

It is neceſſary to inform the reader, that the ſpeedy publication of the concluding part of this work was rendered neceſſary by the diſſolution of the Parliament, which took place October 24, 1806: and that in conſequence of this, many authorities which were meant to be introduced as notes to the later caſes, have been unavoidably omitted. It was the intention of the author, by thoſe means, and by enlarging the index into a digeſt of adjudged caſes, to have collected into theſe volumes, moſt, or all of the deciſions of the Houſe of Commons, and of ſelect committees, upon queſtions of election law. Since the completion of this deſign has become impoſſible, he has finally reſolved upon the execution of another plan, namely, of publiſhing theſe and other materials which he has collected during the courſe of his labors, in the form of a treatiſe upon this branch of the law, and upon the nature, qualities, and ſpecies of the elective franchiſe.

He deems it incumbent upon him to make his acknowledgments to Mr. Davies, of Leominſter, for having favored him with the note of the caſe of Leominſter, 1796, ſubjoined in the appendix to this volume; and to Mr. Eſtcourt, of Lincoln's Inn, for the uſe of the minutes of evidence and the ſpeeches of counſel in the caſes of Malmeſbury, 1796, and 1797, from which he has been enabled to form a report of thoſe caſes: and he feels a peculiar pleaſure, at the concluſion of this work, publicly to teſtify

teſtify his gratitude, and infinite obligations, for the aſſiſtance which he has derived throughout the whole progreſs, both of the compoſition and publication of it, from the active friendſhip, the able judgment, the profound learning, and accurate diſcernment of Mr. Hobhouſe of the Middle Temple.

It remains only to add a few remarks, ariſing either from ſome elections and returns to the late Parliament, which were not the ſubjects of a petition, or from petitions preſented, but not referred to ſelect committees, and which therefore could not find a place in the body of this work *.

Dec. 31, 1806.

* 30 Nov. 1803. The Houſe was informed, that the petitions, preſented in the former Seſſion, complaining of undue elections for the boroughs of Kingſton-upon-Hull, Leominſter, Shafteſbury, and Boſton, had not been renewed in this Seſſion. Petitions not renewed.

23 Nov. 1803. An order for conſidering a petition againſt an election for the borough of Great Grimſby, (preſented, Aug. 1, 1803,) was diſcharged, the petitioners not having entered into their recognizances. The Parliament met 22 Nov. The former Seſſion had been put an end to by prorogation, 12 Aug. Great Grimſby, 1803. Petition diſcharged for want of recognizance.

23 Nov. 1803. A petition from Mr. Ogle, had been preſented, 27 May, complaining of Mr. Fydell's election for the borough of Boſton, in which Mr. F's qualification was queſtioned. The Houſe being informed, that Mr. F. was abroad at the time when the petition was preſented, and that he did not return till the beginning of November, when he was for the firſt time informed of the contents of the petition, and therefore could not comply with the order of the Houſe, 21 Nov. 1717: and the entry in the Journals of the proceeding in the caſe of Weſtbury, 1747, having been read; it was ordered that Mr. F. ſhould be allowed ſeven days more, for delivering in his qualification. See *ſupra*. Boſton, 1803. Time allowed for S. M. to deliver in his qualification.

Chippenham, 1804. Petition of appeal abandoned.

26 Mar. 1804. A petition was preſented from certain inhabitants of Chippenham, paying or liable to pay ſcot and lot there, praying to be permitted to oppoſe the right of election reported to the Houſe by the ſelect committee, 28 Mar. 1803. A petition was preſented, 13 Apr. by other perſons, praying to be permitted to defend the ſaid right: theſe petitions were taken into conſideration, 18 May: on which day, no counſel, or agent, or party, appearing on the part of the firſt petitioners, the oders for taking the ſaid petitions into conſideration, were diſcharged.

Catherlogh, 1806. Return amended where the chriſtan name of the member was miſtaken: and leave given to petition.

9 July 1806. The return for Catherlogh, of Michael Symes, Eſq. was amended, by inſerting the name of Michael therein inſtead of Arthur. The returning officer attended at the bar of the Houſe, and ſtated that the word 'Arthur' had been inſerted by miſtake. Leave was given to petition againſt the election, or return of Mr. Symes, within fourteen days. A precedent was read from the Journal 26 May, 1802, where the name of Evan Law, had been inſerted in the return for Newtown, by a miſtake inſtead of Ewan. And ſee Sutherlandſhire, 15 Dec. 1790.

Petition diſcharged for want of recognizance.

3 July, 1806. A petition from Mr. Davies preſented, 18 June, complaining of the election of Mr. Colclough, for the county of Wexford, in Ireland, was diſcharged, the petitioner not having entered into his recognizance,

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In Vol. I. xiv. line 11. *for* 436, *read* 439.
— 21. *for* Caſe, *read* Borough.
xviii. — 24. *for* c. 25. *read* c. 52.
xxiv. — 33. *for* c. 84. *read* c. 52.
xxviii. — note [b] *for* 55, *read* 35.
xxix. — 4. *for* 7th. *read* 27th.
xxxix. — 25. *for* Jan. *read* Jun.
23. — 26. *for* 23, *read* 26.
56. — 33. *for* in operation, *read* inoperative.
194. — 12. *for* 1775, *read* 1776.
246. — 15. *for* money, *read* many.
291. — 16. *for* 5 Burr. *read* 4 Burr.
306. — 16. *for* eight, *read* twelve.
327. — 13. *for* attends, *read* attend.
376. note [n] line 9. *for* fitting member, *read* petitioner.
line 15. *for* the ſame fitting member, *read* the ſame perſon returned upon the ſecond election.
407. — 22. *after* 34 G. 3. *add* c. 74.
428. — 29. *for* 32 G. 3 c 72. *read* 34 G. 3. c. 73.
429. — 36. *for* an, *read* on.
452. — 26. *for* ſtatuary, *read* ſtatutory.
500. — 23. *for* re-elected, *read* elected.
Vol. II. 27. — 37. *for* 3d, *read* 9th.
52. — 1. *for* IV. *read* III.
70. — 19. *for* neceary, *read* neceſſary.
78. — 23. *for* 60, *read* 62.
87. — *Dele* 3 laſt lines of note [r].
148. — 3. marg. *for* of, *read* and.
171. — 26. *for* It, *read* In,
181. — 21. *for* 1775, *read*, 1776.
226. — 12 *after* freeholder, *add*, of an entire tenement.
31. *for* eaſe, *read* caſe.
230. — 25. *for* as, *read* an.
30. *for* Scaber, *read* Seaber.
252. note [f]. *add*, See 19 Jour. 565. Indexes to Journals, Tit. Priſoners.

REPORTS

REPORTS OF CASES

OF

)NTROVERTED ELECTIONS.

CASE XXXVIII.

BOROUGH OF ILCHESTER IN THE COUNTY OF SOMERSET.

mmittee was appointed on the 14th of February 1804, and conſiſted of the following Members:

iam Young, Bart. *Chairman*,
r Ruſſell, Eſq.
nn, Eſq.
helley, Eſq.
atthews, Eſq.
Benyon, Eſq.
. Gunning, Eſq.
ı Frederick, Bart.
Williams, Eſq.
Dugdale Stratford Dugdale, Eſq.
Hon. Cha. Herbert Pierrepont,
Cha. Cheſter, Eſq.
Sir Cha. Talbot, Bart.
Sir Robert Buxton, Bart.
Hon. Chr. Hely Hutchinſon
} choſen by the firſt 13[a].

itioners. John Manners, Eſq. againſt the election of Mr. Brooke.
William Webb, Eſq. againſt the election of Sir W. Manners.
ting Members. Sir William Manners, Bart.
Charles Brooke, Eſq.
unſel for Mr. Manners: Mr. Serjt. Williams.
for Mr. Webb: Mr. Piggott; Mr. Wetherell.
for Sir W. Manners: Mr. Plumer; Mr. Pell.
for Mr. Brooke: Mr. Adam; Mr. Serjt. Lens.

R. Manners[b] in his petition alleged that Mr. Brooke had been guilty of bribery, and of treating; and that l perſons who had been declared, by the committee[c] ıted to try the former election, to have been guilty bery, and whoſe votes, for that reaſon, ſhould have

ere being more than two par-
ee St. 11 G. 3. c. 42. ſ. 6.

[b] Preſented 25th November, 1803.
[c] See *ante*, Vol. I. p. 305.

been diſallowed at the laſt election, had been received to vote for Mr. Brooke. Mr. M. declined producing any evidence in ſupport of his petition.

Mr. Webb's[d] petition contained charges both of bribery and treating, againſt Sir W. Manners, and Mr. Manners.

The election had been held in conſequence of the former election having been declared void. See that caſe reported, *ante*, Vol. I. p. 302.

Right of election.

The firſt return of Members to Parliament for Ilcheſter, according to Mr. Prynne, was in 26 Edw. 1. It continued to ſend Members till 34 Edw. 3. and then ceaſed till 12 Edw. 4[e], after which, (Mr. Carew writes,) it again intermitted, till 1621, 19 Jac. 1., when it was again reſtored. But Sir G. Moore in his report to the houſe, 27 March 1621, ſtates that it ſent Members till H. 5. 1 Jour. 572, 576. There has been no determination upon the right of election there; nor is the mode of electing Members mentioned in the charter, (3 and 4 P. and M.) by which the inhabitants were incorporated[f]. 28 Jan. 1702-3 the right was agreed to be "in the bailiff, capital burgeſſes, "and inhabitants, not receiving alms[g]"; and in 1775 it was agreed that a voter for the borough muſt be a houſeholder, and have a legal ſettlement there[h]. The ſame agreement was made and acted upon, in 1784[i], and in 1802[k]; and upon the preſent occaſion, both at the election, and before the committee.

At the election, the numbers were,

For Mr. Brooke,	- -	81
Sir W. Manners,	-	76
Mr. Manners,	-	75
Mr. Webb,	- -	73

Caſe of Mr. Webb.

The counſel for Mr. Webb propoſed to ſtrike from the poll both of Sir W. Manners, and of Mr. Manners, the votes of ſix perſons who were ſaid not to be houſe-holders, or not to have been ſuch for ſix months previous to the election[l]; againſt one of theſe it was alſo objected, that

[d] Preſented 25th November 1803.
[e] 4 Prynne, 1213.
[f] 3 Ld. Gl. 154.
[g] 14 Journ. 147.
[h] Ib.
[i] 1 Lud. 464.
[k] *Ante*. Vol. I. p. 303.
[l] See ſt. 26 G. 3. c. 100.

he

he had received parochial relief within a year; and againſt another, that he had no legal ſettlement in the borough. They further propoſed to diſqualify ten perſons for bribery, who had voted for the ſame gentlemen; to ſhew a general ſyſtem of bribery and corruption on the part of Sir William Manners and his agents: and to prove, that he had been guilty of particular acts of bribery and of treating.

Objection; that no petition can be maintained againſt a petitioner.

The counſel for Sir W. M. objected in the firſt inſtance againſt any evidence being received, tending to affect the poll of Mr. Manners; ſince it had been decided in the caſe of Middleſex [m], that no petition could be received againſt the pretenſions of a petitioner: that therefore the petition of Mr. Webb, as far as it affected Mr. Manners, was a nullity, and formed no part of the preſent enquiry. The counſel for Mr. Webb contended, that as Mr. Manners had brought himſelf before the committee by a petition againſt one of the ſitting Members, (which petition although abandoned on his part, was ſtill under the judgment of the committee, to determine, as well as to the merits of the petition itſelf, as, whether or not it was frivolous and vexatious,) it was competent to them on the part of their client, to ſtrike off from the poll the votes given for him, and for Sir W. M.; and alſo, to affect him with bribery.

This diſcuſſion was deferred, upon the ſuggeſtion of the chairman that it was poſſible that the queſtion might not ariſe; and upon his recommendation, it was agreed to enter firſt upon the trial of the particular votes.

Caſe of Sir W. Manners.

The counſel for Sir W. Manners objected to Mr. Webb's voters on the following grounds: againſt 18, as not being legally ſettled; or, as not *bonâ fide* houſeholders; or, as not having been ſuch for ſix months previous to the election; againſt ſeven, as paupers; againſt eight, as having been bribed by Mr. Webb; and againſt 19 as having been proved guilty of bribery at the preceding election, being included, by name, in the reſolution of the ſelect committee appointed to try the merits of that election. Eight of the voters for Sir W. M. who ſtood in the ſame ſituation,

[m] *Ante*, Vol. I. p 294. *poſt*. note (A.) and ſee the caſe of Ayleſbury, *poſt* p. 259.

were given up by his counſel. They alſo propoſed to add one rejected vote to the poll of Sir W. Manners. Laſtly, they defended the votes for Sir W. M. that had been objected to; denied the imputations of bribery and treating that had been made againſt him; and charged Mr. Webb with bribery. The evidence in ſupport of their caſe occupied from the 25th of February to 5th March when Mr. Plumer ſummed up the caſe of Sir W. Manners.

Houſeholder.

During the courſe of the trial, (27th Feb.) a diſcuſſion took place reſpecting the ſignification of the word houſeholder in the borough of Ilcheſter. Three queſtions aroſe; 1. Whether under the circumſtances of the preſent caſe, evidence could be received of the right of election actually exerciſed in the borough? 2. Whether evidence could be received of the local uſage of the borough, and of the practice at former elections there, to ſhew what deſcription of perſons had been accuſtomed to vote, under the name of houſeholders? And 3. (it having been determined that ſuch evidence could not be received,) what was the proper and legal ſignification of the word houſeholder[n]?

Evidence not admiſſible to alter a right agreed upon.

Upon the firſt of theſe queſtions, the counſel for Sir W. Manners began to contend that the evidence was admiſſible, becauſe, there being no laſt determination of the houſe, nor act of parliament, nor charter, by which the right of election in this borough was fixed in expreſs terms, no other criterion could be reſorted to, than the fact of the exerciſe of the right: and that the word houſeholder having been introduced by no higher authority than the agreement of parties, it could not be pretended, that any ſuppoſed ſenſe of that word ought to be adopted as the criterion of the right of election, in oppoſition to the matter of fact, and to the actual exerciſe of the right within the borough. But it was ſuggeſted by the counſel for Mr. Webb, and the committee expreſſed the ſame opinion, that the counſel for Sir W. M. by his admiſſion of the right as ſtated in the commencement of this caſe, had precluded himſelf from ſetting up any other right than ſuch as was compriſed within the terms of that admiſſion, and there-

[n] *Ante* Vol. I. p. 263, 274. Caſe of Chippenham.

fore,

fore, that his argument muſt be confined to what was the true meaning of the word houſeholder. Whereupon the counſel for Sir W. Manners, offered evidence to ſhew that by the local uſage of the borough, the word houſeholder was held to ſignify one who perſonally reſided and dieted himſelf in a houſe either of his own, or of another of whom he held it as tenant. They ſupported the admiſſibility of this evidence upon the ground, that the word houſeholder was vague, and equivocal, and like the word "inhabitant," or "burgeſs," might have different ſignifications in different places: that it was cuſtomary, even in caſes where ſuch words occurred in laſt determinations, for committees to receive evidence of fact as to the local uſage, to determine in what ſenſe they ſhould be underſtood in the particular place reſpecting which the queſtion aroſe: that the diſtinction had always been taken between evidence to contradict laſt determinations, and evidence to explain them: in the former caſe, the evidence was rejected; as particularly, in the caſe of Cirenceſter[o] 1792, where it was propoſed to ſhew that it was not neceſſary for a "houſeholder" to have the control of the outer door of his houſe; which was plainly contrary to any ſenſe of the word: but that in the latter caſe it always had been admitted;[p] that therefore, in order to exclude the evidence propoſed in this caſe, it muſt either be ſhewn that the word "houſeholder" was of a preciſe ſignification, and *ex vi termini*, capable of only one ſtrict definition, not to be varied or explained by any extrinſic evidence: or, that the ſenſe attempted to be given to it by Sir W. Manners could in no caſe belong to it.

Evidence not admiſſible to ſhew the ſenſe of the word houſeholder, in a particular place.

The counſel for Mr. Webb, on the other hand inſiſted, that the term houſeholder was a legal term, and not equivocal, nor to be conſtrued by the local uſage of Ilcheſter, or of any other place: that to admit the evidence of ſuch uſage, would be, indirectly, to bring in queſtion the right of election, which had been agreed between the parties: which

[o] 2 Fra. 451. and ſee Preſton, 3 Lud 245. I. p. 64, 379. Taunton, 1775. 1 Ld. Gl. 371.

[p] See 2 Heyw. 213-256. *ante*, Vol.

might equally be done by affixing a new and particular meaning to a term commonly uſed, as by introducing a new term: that the caſe of Cirenceſter exactly applied to the preſent caſe; for there, the committee determined that the word "houſeholder" muſt be determined on the general principles of the law of the land, and not on any ideas ſuggeſted by local uſage [q]. In the other caſes referred to, the expreſſions which gave riſe to the admiſſion of explanatory evidence were without doubt equivocal, as the word 'inhabitant,' 'burgeſs,' &c. and it is not denied, that in ſuch caſes explanatory evidence may, and muſt,

[q] The following are the reſolutions of the Committee in the caſe of Cirenceſter, 1792. 2 Fra. 449.

"The counſel for the petitioners having ſtated, and the counſel for the ſitting Member having admitted, that according to divers determinations made in the Houſe of Commons on the 21ſt of May 1624, the 4th of November 1690, and the 8th of December 1709, and the true intent and meaning of the ſaid determinations, as well as by conſtant uſage, the right of election in the borough of Cirenceſter, in the county of Glouceſter, is in the inhabitants, houſeholders, legally ſettled, that no inmates have a right to vote for the ſaid borough, nor inhabitants of the Abbey, the Emery, and Spiringate-lane; Reſolved,

"That it is the opinion of this committee, that no perſon can be deemed a houſeholder, who does not poſſeſs an excluſive right to the uſe of the outward door of the building, although, by taking inmates, he may have relinquiſhed for a time the exerciſe of that excluſive right; neither can a perſon whoſe habitation is compoſed of more apartments than one, be deemed a houſeholder, unleſs he alſo poſſeſſes an excluſive right to the uſe of the ſtaircaſe, door-way, or other paſſage, that forms the means of communication between his ſeveral apartments; although by taking inmates he may have likewiſe relinquiſhed for a time the exerciſe of that right.

"The original right to an excluſive uſe is then the point of diſcrimination between the houſeholder on the one hand, and the inmate on the other.

"The term *outward door to the building*, does not include within its meaning the gates or outward door of a court or paſſage open to the ſky. A houſe may contain but a ſingle apartment; yet it does not follow as a neceſſary concluſion, that a ſingle apartment, though furniſhed with a ſeparate outward door, will conſtitute a houſe; for a ſhop or ſtall, unleſs it be uſed as a dwelling, is certainly not a houſe.

On this ſubject the following reſolutions were afterwards added;

"That it is the opinion of this committee, that the legal meaning of the terms *houſeholders* and *inmates* muſt be determined on the general principles of the law of the land, not on any ideas ſuggeſted by local uſage."

"That it is the opinion of this committee, that if a paſſage is conſidered as a ſtreet-paſſage, (though covered) all the houſes that have ſeparate outward doors opening into that paſſage, are good votes."

be

be received; but it is only by reaſon of the ambiguity of the original phraſe.

The committee determined, that the evidence ſhould not be received.

An argument then took place upon the legal ſignification of the word 'houſeholder,' the counſel for Mr. Webb defining it to ſignify one who has a houſe either of his own, or as tenant to ſome other perſon, in which it was not neceſſary for him to be actually reſident, it being ſufficient if he was reſident within the borough: the counſel for Sir W. Manners contended on the contrary, that it ſignified one who both perſonally inhabited and dieted himſelf in his houſe. Arg. upon the legal ſignification of the word houſeholder.

The latter began their argument by citing the definition given by Dr. Johnſon, of the word 'houſeholder,' in his dictionary: a houſeholder is ſaid to be the 'maſter of a family[r]' and a houſekeeper, in the ſame book, is ſaid to be a 'houſeholder, maſter of a family.' The words, 'houſeholder' and 'houſekeeper' are uſed ſynonymouſly in ſt. 26 G. 3. c. 100. From this it may be inferred, that the idea of an actual and perſonal reſidence in the houſe, was inſeparably annexed to the term 'houſeholder.' Lord Coke in his commentary upon the ſtat. 22 H. 8. (of bridges [s],) explains the word 'inhabitants' to mean in one ſenſe every perſon, though he have but a perſonal reſidence, as ſervants, &c: but in the ſenſe in which it is uſed in that ſtatute, to mean only houſeholders; 'ſo as to diſtrain upon his lands, goods, and chattels.' All theſe expreſſions point to ſomething more than a mere property in, or right of poſſeſſion of a houſe, namely to an actual and local reſidence in it. The word 'houſeholder' refers to a man's houſe, as his home, in the ſenſe that the word *domus* occurs in the civil law, when it is uſed to ſignify a domicile. Domat ſays, '*eam domum unicuique eſſe, ubi ſedes et tabulas ſuarumque rerum conſtitutionem feciſſet.* And, in another place, *domum accipere debemus, non proprieta-* *Quære.*

[r] Houſeholder, (*pater familias,*) is the occupier of a houſe, a houſekeeper, or maſter of a family. Jac. Law. Dict.

[s] 2 Inſt. 703. See Peterborough, 1775, 3 I.d. Gl. 86, 87.

tem domûs, ſed domicilium. So in the criminal law of England, he only is an houſe-breaker who breaks into the dwelling-houſe of another; that is, where he ſleeps and inhabits. In the common acceptation of the word, a man cannot be ſaid to be the houſeholder of a houſe in which he does not reſide. And the foundation of the right of election was, that it ſhould be exerciſed by thoſe only, who bore the public and parochial burdens in the borough.

Arg. that a *houſeholder* need not reſide in the houſe.

The counſel for Mr. Webb, on the other hand, diſtinguiſhed between a houſeholder, and a houſekeeper, and ſaid that the former word did not include the idea of actual reſidence, and diet, as the latter did. That Dr. Johnſon's definition referred to the vulgar acceptation of the word, and not to the legal ſignification of it: that there was no doubt that a perſon who poſſeſſed a houſe in a town was aſſeſſable under the ſt. H. 8. although he did not reſide in it, and therefore the authority cited on the other ſide from that ſtatute was againſt themſelves. That the caſes of domicile related only to perſons who had diſtinct places of reſidence, diſtant from each other; but here, it is admitted to be neceſſary that the voter ſhould have his reſidence in Ilcheſter: and they referred to Mr. Simeon's note of the caſe of Seaford, 1792, p. 128, 129.

Judgment of the Committee.

On the following day (28 Feb.) the chairman delivered the opinion of the committee at conſiderable length: the ſubſtance of it was, that ſince the right had originally been declared to be in the inhabitants at large, and ſince that right appeared to have afterwards been reſtricted to inhabitants of a particular deſcription, the committee, adverting to the general principle of the original repreſentation of this borough, would reſtrain the right as little as poſſible, and they required only, that the voter ſhould be an inhabitant of the borough legally ſettled, that he ſhould be the *bonâ fide* occupier of an houſe within it, either as his own, or as tenant to the owner of it; and that he ſhould have the control of the outer door of it. He further added, that the committee deſired it might be underſtood that they did not take upon themſelves to decide upon the preciſe meaning of the word

word 'houſeholder' as a general term, or to furniſh an authority in any future caſe [t].

An important queſtion aroſe with reſpect to one of the claſſes of voters above-mentioned, *viz.* the 19 perſons who had been reſolved by the former committee, to have committed bribery: and whom the counſel for Sir W. Manners contended to have been diſqualified to vote at the laſt election: the caſe of one of them (Ralph Weſt,) was argued (29. Feb.) by the counſel on each ſide.

Whether a voter declared guilty of bribery by a committee, the election being avoided, can vote at the enſuing election?

The reſolution of the former committee was read, ſtating "that it is the opinion of this committee, that the following 32 perſons" (&c. of whom Ralph Weſt was one,) "having received bribes previous to the laſt election for the borough of Ilcheſter, in the county of Somerſet, were thereby diſqualified from voting at the ſaid election [u]."

Evidence.

Then the writ under which the laſt election had been holden was read [v]. It was admitted that Ralph Weſt had taken the bribery oath at the firſt election.

The counſel for Sir W. Manners contended that the vote was void.

The writ, by virtue of which the preſent return has been made, was iſſued in conſequence of a former writ not having been fully executed; the election holden under that writ having been declared null and void by a court of competent judicature. It is therefore in the nature of an *alias & pluries* writ at common law [w]; by which the ſheriff is commanded, 'as before' (or 'as oftentimes before') he has been commanded, to execute the particular duty expreſſed in the writ.

Arg. againſt the vote.

The diſqualification of a voter for bribery is not the reſult of any ſtatutory proviſion, but of the common law of Parliament. By that law, a perſon bribed to give his vote at an election is rendered incompetent to vote at that elec-

[t] No entry either of the queſtion argued, or of the deciſion of the committee, was made in the minutes.

[u] Made 26 March 1803. See *ante* Vol. I. p. 305.

[v] See *poſt* p. 254. note (B.)

[w] Writs of *alias and pluries* are iſſued where nothing has been done by the Sheriff, under the firſt writ.

tion.

tion. The ſame election continues, as long as the vacancy remains unfilled. Where the firſt writ, and the proceedings under it, have been declared void, the ſecond writ has relation to the original vacancy of the ſeat, and not to the vacancy occaſioned by the avoidance of the preceding election; and ſhould ſeveral elections be ſucceſſively avoided, the caſe would be ſtill the ſame: for it is plain that another vacancy cannot take place, till after the firſt has been filled up. The diſqualification introduced by ſt. 2 G. 2. c. 24. ſ. 7. which for ever diſables the offender from voting in any election of any Member to Parliament, has no relation to this queſtion, being founded upon the words of a poſitive law, and ariſing from particular circumſtances, *viz.* the legal conviction of the offender.

St. 2 G. 2. c. 24.

The principles and authorities upon which the preſent queſtion is to be diſcuſſed, are for the moſt part to be found among caſes of bribery by candidates. The diſqualification of a candidate, like that of an elector, ſtood originally upon the ground of the common law; the ſtatutes that were afterwards paſſed being intended only to give a fuller effect to what before was the law of Parliament, and an inherent principle in our conſtitution. In 1571, Thomas Longe was expelled the Houſe of Commons for bribery. In 1696 the ſtatute 7 W. 3. c. 4. was paſſed, diſabling the offender in particular circumſtances from ſitting in Parliament 'upon *ſuch* election:' in the year 1699 Mr. Sloane, whoſe former election for Thetford had been avoided for treating, was judged incapable to ſit upon a ſecond return[x]. In the caſes of Hindon 1777[y], of Honiton 1782[z], and of Kirdcudbright 1782[a], it was determined that a candidate who had been guilty of bribery at the original election, which election had been avoided, was incapable to be returned at any election which took place in conſequence of ſuch avoidance. The caſes of

[x] 12 Journ. 498, 636. 13, 134, 145, 223, 225, 251. Clifford, 169, 172.

[y] Cliff. 185. *Ante* Vol. I. p. 376.

[z] Cliff. 152. 3 Lud. 165.

[a] 3 Lud. 466.

South-

Southwark 1796 [b], and of Canterbury 1797 determined the ſame point with reſpect to treating. That of Norwich 1787 [c], which may be cited on the other ſide, can hardly be oppoſed to ſo ſtrong a current of authorities [d].

When it is conſidered, upon what foundation theſe determinations ſtand with reſpect to a candidate, it will appear, that they are equally applicable to the caſe of a voter. In the former caſes, the conſtruction put upon the ſtatutory proviſions, does not ariſe ſo much from the expreſs injunction of the ſtatute, as from the nature of the ſubject. The ſtatute having declared a candidate in certain circumſtances incapable to hold his ſeat upon his election to ſupply a particular vacancy, it naturally followed, that no election of that candidate, to ſupply that vacancy, could be valid. In like manner, the vote of a perſon bribed being void by common law, it follows, that his vote can never be effectual to ſupply the original vacancy in the Houſe of Commons of that place, which, by reaſon of an undue election is ſtill open, and which remains open, till a valid election has taken place. The able reaſoning of Mr. Tierney [e] in the ſecond caſe of Southwark may be applied to the preſent queſtion. He argues, that a candidate whoſe former election has been avoided for bribery, has in reality thereby ſuffered no puniſhment, if he may be returned upon a new election: ſo, the elector ſuffers nothing, who is permitted to vote at a new election, his vote having been ſet aſide upon the avoided election. Where an election has been declared void, the votes of all the electors given thereat are, of courſe, annulled, whether corruptly given or not: can it therefore be ſaid, that a voter, for whoſe bribery the election may have been ſet aſide, has, at the ſucceeding election, the ſame privilege with others who have not been bribed? If ſo, in what does the diſqualification ſaid to be attached to bri-

[b] Cliff. 132.

[c] 3 Lud. 445.

[d] It is remarkable, that in the caſe of Aldborough 1696, Mr. Fairfax's election, in the room of Sir Mich. Wentworth deceaſed, having been avoided for a breach of the ſt. 7 W. 3. the new writ is ordered for electing a burgeſs in the room of Sir M. W. deceaſed. See 12 Jour. 19. Clifford, 167, 213. and ſee the caſes cited by Mr. Tierney, *ib.* 214.

[e] Cliff. 207, 325.

bery

bery conſiſt? Therefore it is ſubmitted, that ſince any number of elections avoided for bribery, are to all intents and purpoſes void, as if they had never been holden, the diſqualification of a voter for bribery continues as long as the vacancy of the ſeat; that is, until the vacancy, for which the firſt writ iſſued, ſhall have been filled up by a good and ſubſtantial election.

The counſel for Mr. Webb argued as follows:

Arg. in ſupport of the vote.

It is denied that the voter is diſqualified either by the common law of Parliament, or by ſtatute law. The attempt now made, is a new one: no inſtance has been ſhewn where it has been made the ground of objection to a voter, that he had been bribed at a former election; much leſs, where his vote has been ſet aſide for that reaſon. It can ſcarcely be doubted that caſes of this ſort would have occurred, if ſuch a diſqualification had been ſuppoſed to exiſt; for the Journals of the Houſe of Commons preſent examples of bribery, in every ſhape, taken notice of, and puniſhed. Some degree of ſuſpicion, therefore, may reaſonably be attached to a doctrine ſo new, introduced into a caſe of ſuch frequent occurrence. And ſince it is admitted that this caſe muſt be decided by the common law, which can only be collected from the deciſions, or from the general underſtanding, of courts of juſtice on former occaſions, the total abſence of all precedent or authority is concluſive againſt the poſition contended for on the other ſide.

The analogy drawn between the preſent caſe, and that of a candidate, is defective in every particular. The latter reſts upon a conſtruction put upon the poſitive words of an act of Parliament; from whence no aſſiſtance can be derived in the deciſion of a point ariſing from the common law. But the moſt material diſtinction, is that which reſults from a view of the different ſituations of the elector, and of the candidate. Where a candidate who has been diſqualified for bribery at the firſt election, offers himſelf again upon the ſecond, there ſeems to be no injuſtice in objecting his former offence againſt him, and the impolicy of permitting him, in the end, to enjoy the full benefit of the corrupt means he has made uſe of, is deſerving of great conſideration.

tion. But it muſt be remembered, that in ſuch a caſe, the judgment of the former committee, which is produced againſt him upon the ſecond trial, is the judgment in a cauſe to which he himſelf was a party, and in which he had an opportunity of being heard in his own defence. The preſent caſe is widely different. The candidate (Mr. Webb) for whom the vote of Weſt was given, was not a candidate at the former election, and conſequently, no party to any of the proceedings thereat, or before the committee appointed to try the merits of that election: the judgment of that committee therefore, is, as to him, *res inter alios acta*, and can in no way be legally made uſe of to his prejudice. Further, the voter himſelf cannot be ſaid to have been ſo far a party to thoſe proceedings, as to be concluded by them on any future occaſion. He had no opportunity of being heard in his defence to the charge made againſt him, or of offering evidence to repel it. It cannot therefore be reaſonably contended, that the vote of this elector ſhould be ſtruck off from the poll of the candidate, by a ſentence, againſt which neither the elector nor the candidate could be heard. It may have happened, that the candidate for whom the vote was given at the former election, abandoned the defence of it: he poſſibly might have a right to do ſo, as far as his own ſeat was concerned; but it cannot be ſaid that he had a power, by ſo doing, to diſqualify the voter from giving his vote for another candidate, at a future election. It is therefore ſubmitted, that the reſolution of the former committee with reſpect to the voter, cannot operate as a diſqualification of him upon the preſent occaſion: neither can the committee receive original evidence of the fact itſelf of bribery at the firſt election: their powers do not extend to try the merits of a former election, where Mr. Webb was not a candidate, and with which he had no concern. Thoſe who deſired to diſqualify the voter upon the ground of bribery, ought to have purſued the means provided by the ſtat. 2 G. 2. c. 24. for that purpoſe, namely, a proſecution of him to conviction for his offence within two years after the commiſſion of it. This not having been done, he ſtands in the ſame ſituation as any other elector, and is entitled to the

ſame

ſame privileges; for it cannot be pretended that the reſolution of the laſt committee amounts to a *lawful conviction*, within the terms of that ſtatute.

Reply. The counſel for Sir W. Manners, in reply.

The argument, that it would be unjuſt to ſtrike off the vote of one who has not been heard in his own defence, might equally be urged againſt ſtriking off any vote in the trial of a controverted election. The elector, whoſe vote is in queſtion, is no party before the committee, yet it is the conſtant practice to decide upon his right to vote, whether the objection made to it ariſe from a defective title, or from ſome offence which he has committed. The reaſon for this mode of proceeding is, that the rights of all the individual electors are ſuppoſed to be defended by the candidate who repreſents them. There is therefore no more injuſtice done by this committee receiving the judgment of the former committee as evidence of the voter's crime, than was done by the firſt committee receiving evidence of the fact, in the voter's abſence. It has been aſked, by what law is the diſqualification, to the extent now contended for, authoriſed? It is anſwered, that the diſqualification of a voter for bribery, ſtands entirely upon the common law of Parliament: that the extenſion of it to the preſent caſe, neceſſarily follows from the ſecond election being, as it were, a continuation of the firſt, and conſequently being the very election at which the bribe has been given; the election continuing until the vacancy is filled up: and it was upon this view of the nature of the ſecond election, that the words 'ſuch election' in the ſtatute of William were held to compriſe every election that might take place until a legal and valid return was made.

Deciſion. That the voter was not diſqualified. The committee determined, that Ralph Weſt was not diſqualified. Mr. Plumer, upon this deciſion being intimated to the counſel, enquired, whether or not he might underſtand it to be the opinion of the committee that if the fact of bribery at the former election ſhould be proved by original evidence, the voter would not be diſqualified? The chairman anſwered, that ſuch was the opinion of the committee; that they had decided the queſtion upon general

principles; and that they could not try the merits of the former election.

Among the other caſes of objected votes, no caſe occurred of ſufficient importance to be mentioned, except that of Richard Greenland, who had been rejected at the poll, as not having a legal ſettlement in the borough, and whom it was propoſed to add to the poll of Sir W. Manners. It was proved that he was reſident in Ilcheſter, and that he had been duly rated in the ſum of 2*d.* for his houſe, and 2*d.* for his ſtock in trade, and that he had paid thoſe rates. It was contended, that he had gained a ſettlement by paying his ſhare to the pariſh taxes under ſt. 3 & 4 W. & M. c. 11. ſ. 6., and that the ſt. 35 G. 3. c. 101. ſ. 4., (which enacts that no perſon ſhall gain a ſettlement by paying taxes for *a tenement* under 10*l.* annual value,) did not affect this caſe, ſince ſtock in trade could not be called a tenement. The counſel on the other ſide acquieſced in this conſtruction of the ſtatute, and the vote was added to the poll of Sir W. Manners.

Settlement gained by paying rates for ſtock in trade under 10*l.*

The evidence of bribery, on each ſide, produced nothing worthy to be reported.

On the 7th of March, the committee determined, that Mr. Brooke was duly elected; that neither Sir W. Manners, Mr. Manners, nor Mr. Webb, were duly elected; and that the election of Sir W. Manners was void: that Sir W. Manners by himſelf and his agents, and Mr. Webb by his agents, had been guilty of bribery.

Deciſion and report.

It may be mentioned, as an incidental point in this caſe, that a voter was permitted to be a witneſs for the purpoſe of proving that he himſelf had no right to vote, being firſt admoniſhed by the chairman that he was not bound to anſwer any queſtion that had that tendency. No objection was made to his competency on the part of the candidate for whom he had voted.

Incidental points. Voter, a witneſs againſt his own vote.

An application was made on the part of Mr. Webb to the Court of King's Bench for a *habeas corpus ad teſtificandum* to iſſue to the gaoler of Ilcheſter gaol to bring up a witneſs before the committee. The Speaker, upon application, had iſſued his warrant to bring up the witneſs by the day appointed.

Priſoner brought up to give evidence.

pointed: the preſent motion was made in order to obviate any difficulty the gaoler might make to ſuffer the priſoner to go out of confinement without the authority of the Court. It was ſaid that a ſimilar application had before been granted to bring up a priſoner to be examined before the Houſe of Lords, upon the refuſal of the gaoler to let his priſoner go without ſuch authority. The Court granted the application, the rule having been firſt ſerved upon the under-ſheriff, the ſolicitor of the Treaſury, the priſoner, and a perſon at whoſe ſuit the priſoner was then in execution; and the applicant undertaking to pay the expences of the witneſs being brought up and conducted back to gaol. The priſoner was confined in gaol by virtue of a commitment for non-payment of a fine impoſed upon him by the Court of K.B. for an aſſault. In the matter of Sir E. Price, 4 Eaſt's Rep. 587.[f]

NOTE (A), from p. 239.

The reader will have obſerved that Mr. Webb was the laſt on the poll, and that Mr. Manners ſtood next in order to the ſitting Members. If the majority in favor of Sir W. Manners had been ſet aſide, and Mr. Webb had not been diſqualified, it might have become a queſtion, in what manner the return ſhould be amended? The ſame queſtion might alſo have occurred in the next caſe, of Ayleſbury: with this difference only, that there, Mr Bernard, who ſtood third on the poll, had not petitioned; whereas here, Mr. Manners had petitioned, but had abandoned his petition in the outſet of the caſe. In the Ayleſbury caſe, the committee refuſed to receive any evidence affecting Mr. Bernard The reporter has not met with any caſe where a queſtion of this kind has ariſen; although probably, the Journals of the Houſe o

[f] See the next caſe. Before the appointment of ſelect committee it ſeems to have been uſual for the houſe to procure the attendance of perſons confined in gaol as witneſſes, by an order to the Speaker to iſſue his warrants to the Marſhal, or Gaoler, and to the Serjeant at arms. See Bramber, 3 Ap 1728, 21 Jour. 113. Flint, 23 Mar 1736, 22 Jour. 821. Southwark, 4 May, 1769, 32 Jour. 289.

Com-

Commons contain ſome precedent applicable to the caſe. It is likely, that conſiderable objections would ariſe againſt receiving evidence to diſqualify a candidate who was no party before the committee.

In the caſe of Sutherland, 1792*, the numbers on the poll were, for General Grant, the ſitting Member, 8; for Mr. M'Leod, 5; for Mr. Gordon, 3. Mr. Gordon petitioned for the ſeat, ſtating alſo, that Gen. Grant was ineligible. At the trial, he inſiſted only on a void election. After Mr. G. had petitioned, Mr. M'Leod preſented a petition, claiming the ſeat. The committee having heard Mr. Gordon's objections to Gen. Grant's eligibility, and having decided againſt them, Mr. M'Leod's counſel abandoned his petition, which was decided to be frivolous and vexatious. In defence of his conduct, his counſel ſtated (p. 183.) "that had he not petitioned, the election might have been declared void, and Mr. M'Leod would not have obtained the ſeat, to which he conceived himſelf entitled, had Gen. Grant been declared ineligible." To this Gen. Grant's counſel replied, "that his fears were groundleſs, as the committee would not have declared Mr. Gordon duly elected, till they had diſallowed the 5 votes of Mr. M'Leod, who ſhould have preſented a petition, diſcloſing the circumſtances of the caſe, and praying to be admitted a party to defend the ſeat." *Quære*, as to ſuch a mode of proceeding.

On the other hand, the expreſs words of the ſtatute 10 G. 3. c. 16. ſ. 18. authoriſe the committee to report only, whether the *petitioners*, or *ſitting members*, or either of them, be duly elected or returned, or whether the election be void; under which authority it would ſeem to be incompetent for them to make a return of a candidate who had not petitioned, but who appeared from the evidence to be entitled to the ſeat. It may be obſerved however, that ſelect committees have made no difficulty of reporting candidates to be duly elected, or to be entitled to the return, in whoſe favor electors have petitioned, and who have not petitioned themſelves; as in the caſe of Colcheſter, 1782†; of Downton, 1785‡; and of Middleſex, 1805§.

* Reported 2 Fraſer, 158.
† 3 Lud. 166.
‡ Not reported.
§ *Poſt.*

Note (B.) from p. 245.

The following is the form of the writ under which the election was holden.

George the Third, by the Grace of God, &c. Whereas Thomas Plummer and William Hunter, Eſquires, were lately choſen burgeſſes for the borough of Ilcheſter in your county for the preſent Parliament, ſummoned to be holden in our city of Weſtminſter the 31ſt day of Auguſt now laſt paſt, and from thence by our ſeveral writs prorogued to and until Tueſday the 16th day of November, in the 43d year of our reign, and there now holden; and whereas the lower Houſe of our ſaid Parliament have adjudged the election of the ſaid Thomas Plummer and William Hunter to be void, as by the letter of our right truſty and well-beloved counſellor Charles Abbot, Speaker of our lower Houſe of Parliament, more fully and plainly appears; by means whereof our ſubjects of the ſaid borough are deprived of two burgeſſes to treat for the benefit of the ſame borough in our ſaid Parliament; nevertheleſs, we being unwilling that the commonalty of our kingdom, in our ſaid Parliament aſſembled to treat of the buſineſs concerning us, the ſtate, and defence of our kingdom and the church from the aforeſaid cauſe ſhould be diminiſhed or leſſened, whereby thoſe affairs may not have a due end, we command you, that in the place of the ſaid Thomas Plummer and William Hunter, within the borough aforeſaid, two other fit and diſcreet burgeſſes of the aforeſaid borough, (proclamation being firſt made of the premiſes, and of the day and place), freely and indifferently, by thoſe who ſhall be preſent at the proclamation, according to the form of the ſtatute in that caſe made and provided, you cauſe to be elected, and the names of ſuch burgeſſes to be inſerted in certain indentures to be thereupon made between you and them who ſhall be preſent at ſuch election, (whether at the ſaid election they ſhall be preſent or abſent,) and to cauſe them to come to the ſaid Parliament, ſo that the ſame burgeſſes ſo to be choſen may have full power and ſufficient authority for themſelves and the commonalty of the aforeſaid borough, to do and conſent to thoſe things which in our Parliament aforeſaid by the common council of our realm (by the bleſſing of God) ſhall happen to be ordained upon the aforeſaid affairs, willing nevertheleſs, that neither you, nor any other ſheriff of this our kingdom in any wiſe be elected; and the election

tion ſo made diſtinctly and openly under your ſeal and the ſeals of them who ſhall be preſent at ſuch election, certify you to us in our Chancery forthwith, remitting to us one part of the aforeſaid indentures annexed to theſe preſents, together with this writ. Witneſs ourſelves at Weſtminſter, the 30th day of March, in the 43d year of our reign.

BATHURST and BATHURST.

To the ſheriff of the county of Somerſet. A writ for a new election of two burgeſſes for the borough of Ilcheſter.

BATHURST and BATHURST.

CASE XXXIX.

THE BOROUGH OF MALDEN IN THE COUNTY OF ESSEX.

THIS was a petition of certain electors againſt the election of Mr. Strutt and Mr. Weſtern, preſented 6 Dec. 1802; renewed, 28 Nov. 1803. The petitioners brought forward no evidence in ſupport of their petition, which was determined by the committee to be frivolous and vexatious; and the ſitting Members were reported to be duly elected, 16 Feb. 1804.

CASE XL.

THE BOROUGH OF HONITON, IN THE COUNTY OF DEVON.

NO evidence was produced in support of this petition[a], (of electors) and the ſitting Members, Sir John Honywood and Mr. Shum, were reported, 20 Feb. 1804, to be duly elected.

[a] Preſented, 6th December, 1802, renewed, 28th November 1803.

CASE XLI.

THE COUNTY OF THE TOWN OF CARRICKFERGUS

MR. Ezekiel Davys Wilſon, produced no evidence i ſupport of his petition[a]; and the ſitting Membe Lord Spencer Chicheſter was reported (23 Feb. 1804,) t be duly elected.

[a] Preſented, 6th December 1802, renewed, 28th November 1803.

CASE XLII.

THE BOROUGH OF SUDBURY, IN THE COUNTY C SUFFOLK.

IN this caſe the petitioners (freemen,) produced no ev dence in ſupport of their petition[a], and the ſittir Member, Mr. Pytches, was reported to be duly elected, 2 February, 1804.

[a] Preſented, 7th December, 1802, renewed, 28th November 1803.

CASE XLIII.

THE BOROUGH OF MINEHEAD, IN THE COUNTY OF SOMERSET.

IN this caſe the petitioners, (Mr. Langſton and Mr. Woodbridge) produced no evidence in ſupport of their petition [a], and the ſitting Members, Mr. Luttrell and Mr. Patteſon were reported to be duly elected, 24 Feb. 1804.

[a] Preſented, 7th December, 1802, renewed, 28th November 1803.

CASE XLIV.

THE CITY OF HEREFORD.

THE petitioners (freemen,) produced no evidence in ſupport of their petition [a]. The ſitting Members (Mr. Scudamore and Mr. Symonds,) were declared to be duly elected, and at the inſtance of their counſel, the petition was reſolved to be frivolous and vexatious, 28 Feb. 1804.

[a] Preſented, 7th December, 1802, renewed, 28th November 1803.

CASE XLV.

THE BOROUGH OF AYLESBURY, IN THE COUNTY OF BUCKS.

The Committee was appointed on the 24th February 1804, and conſiſted of the following Members:

Sir George Cornewall, Bart. *Chairman.*	Sir Hugh Inglis, Bart.	
Sir John Dashwood King, Bart.	John Buller, Eſq.	
Sir W. Lemon, Bart.	Lord Oſſulſton.	
Gabriel Tucker Steward, Eſq.	Edward Berkeley Portman, Eſq.	
Francis John Browne, Eſq.	Sir Martin B. Folkes, Bart.	choſen by the firſt 13[a].
John Smith, of Wendover, Eſq.	Cha. W. Williams Wynn, Eſq	
John Hammet, Eſq.		
Sir Jacob H. Aſtley, Bart.		
Baſcoe Grenfell, Eſq.		

Petitioners. 1. Thomas Francis Fremantle, Eſq. 2. Electors.
Sitting Members: James Dupré, Eſq. Robert Bent, Eſq.
Counſel for the petitioning candidates: Mr. Plumer, Mr. Gaſelee.
For the electors: Mr. Dayrell.
for Mr. Bent: Mr. Adam; Mr. Clifford.
for Mr. Dupré: Mr. Serjt. Runnington; Mr. Conſt; in the abſence of either, Mr. Stracey.

Petitions.

MR. Fremantle alleged in his petition [b], that the candidates were Mr. Bent, Mr. Dupré, Mr. Bernard, and himſelf: that the returning officers had admitted divers diſqualified perſons to vote for Mr. Bent and Mr. Dupré, and had rejected ſeveral legal electors who tendered their votes in favor of the petitioner: that Mr. Dupré had been guilty of bribery, and of treating; and that Mr. Bent had alſo been guilty of the ſame offences: that by theſe, and other unlawful means, the two ſitting Members had obtained a colorable majority over the petitioner, who had the greateſt number of legal votes, and ought to have been returned [c].

[a] There being more than two parties ſee ſt. 11 G. 3. c. 42. ſ. 6.

[b] Preſented, 6th Dec. 1802, renewed, 28th Nov. 1803.

[c] See the laſt caſe, note (A.)

The

petition[d] of the electors contained a similar claim
ſeat in favor of Mr. Fremantle: and a charge
the ſitting Members, of bribery and treating.

re was no diſpute as to the right of election; it was ed to be in the "houſeholders of the borough, not ng alms[e]." The numbers on the poll were, for Mr. 336: for Mr. Bent, 271: Mr. Bernard 180; Mr. ntle, 34. It was propoſed on the part of the latter nan, to affect ſo many of the voters for the other ates with bribery, as to leave him the majority: the ce however, was almoſt excluſively directed againſt nt, and the voters in his intereſt; as to whom it was that he had been recommended to the electors by perſons, one of whom was a banker at Ayleſbury, ndidate who would give each elector ten guineas for e; and that a public diſtribution of two guineas each y of the voters, had taken place in February 1802. Mr. Bent, before that time, was a ſtranger in the h; and that he had agreed to lodge the ſum of 3000*l* bank of the perſon abovementioned, for the pur- of his election. Similar public diſtributions were ade on the behalf of Mr. Dupré, and Mr. Bernard. m the reſolutions reported by the committee to the it will appear, that in their opinion, Mr. Bent's

Right of election.

ſented, 6th of Dec. 1802; Nov. 28th 1803.

ermined 28 Jan. 1695-6. 11 9. The Parliamentary Hiſtory this borough is curious. It rporated 1553, 4 Mar. by the the bailiff, aldermen, and bur- f the borough of Ayleſbury; re empowered by that charter two Members of Parliament. ade the firſt return that ſame Dr. Brady has inſerted (App. p. o returns, 14 and 28 El. the ade by Dame Dorothy Pack- widow, late wife of Sir J. P. Lord and Owner of the town bury; the latter, by John Pack- ſq. and the commonalty of the ſame borough: and Dr. Willis writes, that a return ſimilar to the laſt was made, 29 Eliz. The ſame author relates, that the returns were afterwards made by the bailiff and burgeſſes, till 3 Car. 1. when it was made by the inhabitants and burgeſſes. Mr. Carew is of opinion, that the corporation was diſſolved prior to 14 Eliz. If ſo, the name of the corporate preſiding officer, continued in the returns long after the office had ceaſed to exiſt. The conſtables are now the returning officers, and the houſeholders, by ſt. 44 G. 3. c. 60. enjoy the right of election, in common with the freeholders (of the annual value of 40s.) of the three hundreds of Ayleſbury.

connexion with the perſons by whom the money was diſtributed was ſufficiently proved. The evidence of bribery was brought home to a conſiderable number of voters, but the counſel for the petitioners acknowledged that they had not ſpecifically proved the receipt of a bribe, by a ſufficient number of them, individually, to reduce Mr. Bent's majority to a minority. But from the general and unreſerved diſtributions that had taken place, the counſel for the petitioners deſired the committee to infer, that by far the greater part of theſe electors were diſqualified, and to ſeat Mr. Fremantle. The counſel for Mr. Dupré made but a very ſhort addreſs to the committee, as they did not conſider him affected by any part of the evidence. The defence of Mr. Bent reſted entirely in obſervation upon the character of the witneſſes for the petitioners, and in contending, that no evidence had been given of his being concerned in any poſitive act of bribery in the borough: they admitted that it had been proved, that he had agreed to pay the ſum of 3000*l.* for a ſeat in Parliament; but they ſaid, that this agreement had not been made with the electors, but with perſons who might be called brokers for the ſeat: that Mr. Bent was not affected by the means which they might have uſed to procure him his return; and that the payment of a ſum of money for a ſeat in Parliament was not a crime, provided that it did not appear that the money had been paid to the electors for their votes.

Deciſion and report.

The Committee determined,

That Mr. Dupré was duly elected: that neither Mr. Bent nor Mr. Fremantle were duly elected, and that the election as to one burgeſs, was void.

Special report.

They alſo reſolved, and reported to the houſe,

'That it appears to this committee, that at the laſt election for the borough of Ayleſbury, in the county of Buckingham, Robert Bent, Eſq. was by his agents, guilty of bribery.

'That it appears to this committee, that ſuch a notorious ſyſtem of corruption was formed, and ſuch inſtances of individual acts of bribery were committed, previous to the ſaid election, with a view to influence the ſame, as to render

render it incumbent on the committee, to ſubmit the ſame to the moſt ſerious conſideration of the houſe, in order that ſuch proceedings may be inſtituted thereon, as the houſe in its wiſdom may think proper to adopt.

'That it appears to this committee, that certain perſons, (naming them) were ſeverally and reſpectively engaged in the ſaid ſyſtem of corruption.'

Incidental points.

No evidence received againſt an unſucceſsful candidate, who does not petition.

The firſt witneſs having ſaid, in his croſs-examination, that he had been invited upon ſome occaſion to meet Mr. Bernard's friends, and his anſwer tending to ſhew a diſtribution of money on the part of Mr. Bernard, it was ſuggeſted, that that gentleman being no party before the committee, either as a petitioner, or a perſon complained of, no evidence affecting him ſhould be received; and the committee accordingly ordered the anſwer of the witneſs to be ſtruck out, as far as it concerned Mr. Bernard.

Proof of bribery to affect individual voters.

A witneſs being called to give an account of what paſſed at a meeting held in Mr. Bent's abſence by certain electors, relative to bringing down Mr. Bent, as a third candidate, to oppoſe Mr. Dupré and Mr. Bernard, ſtated, that the converſation was begun by a Mr. D. The counſel for Mr. Bent interrupted him, and objected to any evidence being given of what Mr. D. had ſaid, unleſs his connexion with Mr. Bent was firſt proved. The committee, after argument, determined that the evidence might be given, for the purpoſe only of diſqualifying individual voters. The witneſs proceeded to ſay, that an offer was made on the part of Mr. Bent, by a certain perſon preſent whom he named, for the payment of the ſum of 3000*l.* to the electors: the witneſs was again ſtopt, and a ſecond argument aroſe; the committee decided that the line of examination might be proceeded in, but that it was to be underſtood that Mr. Bent, although his name were ſo mentioned, would not be criminally affected by it.

Witneſs examined as to his belief of a fact.

A witneſs who had ſtated that he had been preſent at the diſtribution of ſome money, was aſked, in whoſe name, and on whoſe account, that diſtribution had taken place? He anſwered, that he did not know. He was then aſked

aſked for whom *he believed* the diſtribution to have been made? the queſtion was objected to, as being only the reſult of the witneſs's judgment, upon certain facts which muſt have come within his knowledge, in order to enable him to form it: thoſe facts, and not the judgment of the witneſs ought to be given in evidence. It was anſwered that it was very common to aſk a witneſs his belief, and then to require him to ſtate the the grounds of it: that the degrees of knowledge were various, from abſolute certainty, to mere belief, and doubt; that a witneſs was bound to ſtate upon his oath as much what he believed, as what he certainly knew, leaving it to the court, to affix that weight to his evidence, which the accuracy of his memory and the poſitiveneſs of his knowledge required: that at the trial of Lord Thanet, Mr. Sheridan diſclaimed all knowledge of an intent to reſcue Mr. O'Connor: the queſtion being aſked him, whether or not he believed ſuch an intent to have exiſted, it was objected to: but Lord Kenyon told him that he *muſt* anſwer it. And although that queſtion was put to him in his croſs-examination, and in the preſent caſe it was propoſed as a part of the examination in chief, yet that made no difference; for if it was inadmiſſible, it would be equally ſo, in either caſe. In reply, it was ſaid that the queſtion might be more allowable in croſs-examination, as it might tend to try the credit of a witneſs; and that in Lord Thanet's caſe, the queſtion was aſked to ſhew a general diſpoſition in certain of the by-ſtanders to effect a crime, and not to fix it upon any individual, as in this caſe.

The committee decided, that the queſtion might be put.

Exclusion of witneſſes.

Feb. 23. On the 9th day of the ſitting of the committee, Peter Moore, Eſq. the Member for Coventry, was called as a witneſs on the part of the petitioners. Mr. Plumer in his opening for the petitioners had generally ſtated Mr. Moore to have been a confidential friend, and adviſer of Mr. Bent, reſpecting his tranſactions at Ayleſbury, but had named none particularly, in which he had borne a part. Mr. Moore had attended in the committee-room on the firſt ſix days. On the ſecond, it had been jeſtingly obſerved to him by one of

of the petitioners' counſel, that he might poſſibly be wanted as a witneſs: but no further notice was taken of this; and it was admitted, that nothing ſerious was intended. On the 6th, from the examination of one Cole it appeared that Mr. Moore had been a witneſs to an agreement entered into between Mr. Bent and certain perſons on the part of the voters at Ayleſbury, for the lodging a ſum of money in the bank there; on that ſame day, he was informed he would be called as a witneſs; from which time he had abſtained from entering the room. A notice had from the firſt been affixed to the door in the uſual form, that witneſſes were not to be admitted till called for, otherwiſe they could not be examined: this had not been formally reſolved by the committee; but had been notified by the chairman, at the commencement of the trial.

It was at firſt ſuggeſted, as an objection to this gentleman's evidence, that he had been confidentially entruſted by Mr. Bent with all matters reſpecting his election: but this ground was immediately abandoned.

Secondly, it was inſiſted that he could not now be examined, having been in the room during the examination of other witneſſes: and that the rule as laid down by Lord Glenbervie, 1 vol. p. 61. was invariable, viz. "that when a witneſs is under examination, all thoſe who are intended to be called afterwards on either ſide are directed to withdraw; after which, if they remain in the committee room, their evidence will not be received."

Argument for the petitioner.

On the part of the petitioners, after the importance of Mr. Moore's being examined had been obſerved upon, who, as it now appeared, was in poſſeſſion of the moſt material part of the evidence, it was contended, that the rule by which it was attempted to exclude his teſtimony, was a rule of convenience, which any committee might or might not adopt, and which, if adopted, might be diſpenſed with, if there appeared ſufficient cauſe. It could hardly be ſaid to have been adopted by this committee in ſo poſitive a manner, as to impoſe upon them a neceſſity to obſerve it on the preſent occaſion. Moreover, it was a rule founded on

a due regard to the intereſt of the party to whom the witneſs might be adverſe; leſt, being aware of what already had been given in evidence, he might ſhape his teſtimony in ſuch a manner, as might beſt ſuit his friends. It was plain that this witneſs was the friend of the ſitting member; he had attempted to avail himſelf, in the firſt inſtance, of his intimate connexion with him, to excuſe himſelf from giving his evidence; therefore no reaſonable objection could be made on the part of the ſitting member, on the ground of Mr. Moore's having been in the room; for the conſequence, if any, would be favourable to him. With reſpect to the excluſion of witneſſes in ordinary courts of juſtice; if a witneſs entered the court, after having been directed to withdraw, it was the better opinion, that although he might be puniſhed for the contempt, he muſt be ſuffered to give his evidence. In this caſe, however, it would be extremely hard to apply the rule; for it was impoſſible for the petitioners to know that Mr. Moore's evidence would be required, till it appeared from the teſtimony of Cole (who was alſo an adverſe witneſs) that it would be of the utmoſt importance. Circumſtances might frequently happen in the courſe of the trial of a petition, which might make it neceſſary to call witneſſes, and produce evidence, the neceſſity of which could not be foreſeen at the commencement of it. Could it be ſaid, that if theſe witneſſes ſhould appear to have attended at the previous ſtages of the proceeding, their teſtimony was inadmiſſible? The contrary had been decided in the caſe of Southwark 1796[f]. "Thomas Andrews was called on the eighth day. He had been in the committee room during the examination of ſeveral of the witneſſes on the four firſt days; he was not ſummoned till the fourth day, and did not know till then that he was to be a witneſs. Since he was ſummoned, he had not been in the committee room, nor heard any witneſs examined." The committee in that caſe decided, that under thoſe peculiar circumſtances, he might be examined. That caſe was

Quære.

[f] Clifford, 108.

ſtronger

ſtronger than the preſent, becauſe it did not appear there, that the witneſs had any connexion with the ſitting member. Laſtly it was contended that Mr. Moore, being a member of Parliament, the committee had no authority to require him to withdraw; and therefore, that he was not within the operation of the rule.

In reply to the laſt obſervation, it was denied that a member of the Houſe of Commons (not a member of the committee) had any more right to enter into, or remain in a ſelect committee-room, than any other perſon: it was a court of juſtice eſtabliſhed by act of Parliament, and open for all his Majeſty's ſubjects, equally. In anſwer to the other arguments for the petitioners, it was ſaid, 1. that the rule had been publicly affixed to the door of the room, ſo that no perſon could pretend to be ignorant of it: 2. that the rule, if it once ceaſed to be univerſal, was no longer any rule at all; for then it might be eaſily evaded by perſons whoſe intereſt it might be ſo to do: that it had in general been ſo ſtrictly obſerved, that even the agent of the adverſe party had never been permitted to be examined, if he had remained in the room, unleſs his name had been regularly given in to the committee. It had been adopted in the caſes of Cardigan [g] and Worceſter [h] 1776, and by all the committees which had ſat ſince that time. The diſtinction between friendly and hoſtile witneſſes could only be ſeen by adverting to the parties by whom they were produced: any ſuppoſed ties of friendſhip, or bias in the mind of a witneſs, could afford no rule for a court of juſtice to proceed upon. Reply.

With reſpect to the caſe of Andrews, it was ſaid to be a ſolitary inſtance of the rule having been diſpenſed with: the authority of it might therefore juſtly be queſtioned; but admitting it to have been rightly decided, it did not apply to the preſent caſe: for it was not at all known that Andrews would ever be wanted as a witneſs; whereas the connexion of Mr. Moore with Mr. Bent had been ſtated in the opening

[g] 3 Ld. Cl. 226. [h] 3 Ld. Cl. 265.

of

of the petitioners' caſe: therefore it was the laches of the petitioners themſelves, which had cauſed the accident o which they complained; for, from the knowledge of the connexion, they ſhould have collected the neceſſity o producing Mr. Moore as a witneſs, and not from the acci dental diſcovery of a particular fact, tranſpiring from th examination of another perſon. The committee deter mined, "that Mr. Moore could not be examined [1]."

Excluſion of witneſſes.

It was alſo determined by this committee, that a witneſ of the name of Peck, who had been ſerved with a ſummon during the courſe of the trial, and who had been in the room before the ſervice of the ſummons, could not be examined; although the only purpoſe of his being called wa to account for ſome money, proved by the evidence of a former witneſs (the banker of the oppoſite party) to have been paid to him.

Witneſs committed for prevarication.

24 Feb. The committee reported that a witneſs had been guilty of groſs prevarication: and that the committee had, according to the powers given them by ſt. 28 G. 3. c. 52. ſ. 16. committed him to the cuſtody of the Serjeant at Arms. He was ordered to be committed to Newgate, and wa reprimanded and diſcharged, 14 March.

Proceedings in Parliament.

29 Feb. The report was made to the Houſe, and it wa ordered to be printed, together with the minutes of the proceedings of the committee. It was alſo ordered that the Speaker ſhould not iſſue his warrant for a new writ, till the report ſhould have been conſidered. Leave was given (23 Mar.) to bring in a bill for the prevention of bribery and corruption in the election of members to ſerve for this borough; which paſſed the Houſe of Commons 8 May: the Houſe of Lords 22 June: and received the royal aſſent 29 June. The iſſuing of the warrant for a new writ had been delayed by ſucceſſive orders, till 2 July. The ſtatute

St. 44 G. 3. c. 60.

(44 G. 3. c. 60.) enacts, that perſons having a freehold within the three hundreds of Ayleſbury of the yearly value of 40ſ. may vote at elections for Ayleſbury. 2. That the right

[1] Glouceſterſh. 16. Middleſex, *ante*, p. 135. Clifford, p. 167.

of

ction ſhall be in ſuch freeholders, and perſons having
it by the cuſtom of the borough to vote. 3. That
olders before voting ſhall take a certain oath. 4. The
ty for perjury. 5. That the proper officer ſhall
ſe on the writ the day of his receiving it, and ſhall
notice of the election as is thereby required. 6. That
& ſhall be read before every election.

CASE XLVI.

THE CITY OF LONDON.

The Committee was appointed on the 29th of February, 1804, and conſiſted of the following Members:

John Fane, Eſq. *Chairman.*
John Lemon, Eſq.
Lord Templetown.
James Adams, Eſq.
Edward Golding, Eſq.
William Gore Langton, Eſq.
Henry Howard, Eſq.
Lord Huntingfield.
George Shum, Eſq.
W. A. Madocks, Eſq.
James Langham, Eſq.
Cha. M. Ormſby, Eſq.
Thomas Fydell, Eſq.
Edward Hilliard, Eſq. for the petitioner, } Nominees.
William Baldwin, Eſq. for the ſitting Members, } Nominees.

Petitioner, Sir Watkin Lewes, Knight.
Sitting Members, Sir William Curtis, Bart.
Sir John William Anderſon, Bart.
Harvey Chriſtian Combe, Eſq.
Charles Price, Eſq.

Counſel for the Petitioner: Mr. Williams.
for the Sitting Members: Mr. Adam, Mr. Common Serjeant, (Mr. Knowlys.)
for the Sheriffs: Mr. Plumer.

Petition.

THE petitioner[a] complained of the illegal conduct of the returning officers in reducing the number of poll-clerks on the ſixth day of the election from ſix to one; whereby great confuſion was created, and a number of livery-men were prevented from voting, who would have given their votes for the petitioner, and thereby turned the majority in his favor: and that the electors had been deceived by one of the agents for the returning officers, who informed them, during the time that the poll was open, and while ſeveral electors were

[a] The petition was preſented 7th Dec. 1802, renewed, 28th Nov. 1803.

at the huſtings for the purpoſe of voting for the petitioner, that the election was over: and further, "that ſome perſon or perſons, to the petitioner unknown, did, in order to prevent the petitioner from perſonally attending at the huſtings, and otherwiſe exerting himſelf in bringing forward the liverymen of the City, who were deſirous of returning the petitioner as their repreſentative to ſerve in the ſaid Parliament, prevail upon a man who had a legal demand on the petitioner, (but which demand had ſhortly then before been ſettled, by giving him a ſecurity for the amount to his own ſatisfaction,) to cauſe the petitioner to be arreſted and detained in cuſtody; and, by means of the petitioner's abſence during Friday, the 9th of July" (the fourth day of poll,) "the other candidates had opportunities of bringing forward the voters in their favour, and thereby at the cloſe of the poll on that day, the four perſons returned as members to ſerve for the ſaid city, had a conſiderable majority over the petitioner." Arreſt of a candidate.

The right of election for the City of London, is in the Livery-men. Right of election.

The elections there are regulated by ſt. 11 G. 1. c. 18: by ſ. 4., when a poll is demanded, the preſiding officer is required to finiſh it within ſeven days. By ſ. 14, perſons are excluded from voting, who have not been upon the livery 12 calendar months before the election and who have not paid their fines, &c. and who have, at any time within two years before the election, requeſted to be, and accordingly have been, diſcharged from paying to the rates and taxes to which the citizens of London, inhabiting therein, are or ſhall be liable [b], or who ſhall have received alms within that time. St. 11 G. 1. c. 18.

The evidence produced in ſupport of the allegations contained in this petition entirely failed in eſtabliſhing any partiality or neglect of duty in the returning officers; nor did it appear that any prejudice had reſulted to the petitioner from the number of poll-clerks being diminiſhed: or that his arreſt during the election was either malicious and unfounded, or procured by any perſon intereſted in oppoſing Evidence.

[b] See *ante*, Vol. I. p. 108. 507, 8.

Candidate not free from arreſt during his attendance on the poll.

his ſucceſs. His counſel contended for a void election, and finally reſted his caſe upon the privilege, which was ſaid by him to belong to every candidate during an election, to go to and return from the huſtings, without arreſt by civil proceſs; this privilege was ſaid to be founded both upon the principle of law which protects all perſons whoſe affairs require their attendance at a court of record; and upon the analogy to a privilege which was ſaid to be allowed to members after the diſſolution of a Parliament, and which protected their perſons for a certain time, in order to enable them to make their canvas for their re-election. No caſe or authority upon this ſubject, was cited. It appeared that Sir W. L. had been arreſted for 880*l.* as he returned from the huſtings, after the cloſe of the poll, on the fourth day.

2 Str. 985.

Deciſion and report.

The committee, on the 3d of March, determined, that the ſitting Members were duly elected, and that the petition was frivolous and vexatious.

Incidental points.

The following incidental points occurred during this trial.

Production of the poll-books.

The returning officers (the ſheriffs at the time of the election,) and their under-ſheriff, had been ſerved with a notice, and an order to attend, and to produce the poll. The counſel for the ſitting Members objected, that the notice and order ſhould have been directed to the ſheriffs, who were ſo at the time of the trial, and who had the legal cuſtody of the poll-books. But the committee decided that the under-ſheriff, (who had the poll-books in court) ſhould produce them [c].

The

[c] See *ante*, caſe of Herefordſhire, Vol. I. p. 208. In the caſe of Yorkſhire, 24th Feb. 1735, (21 Journ. 587,) it was objected againſt the production of the poll-books by the deputy clerk of the peace, that the ſame had not been delivered over upon oath, and not within the time limited by law: and no proof having been given, that no alterations had been made therein, after the ſaid election, and before the ſaid delivery: reference was made to the preamble of ſt. 10 Ann. c. 23. and to ſect. 5: and to the caſe of Bucks, 12 March 1727; and the deputy clerk of the peace being further examined, it was reſolved, "that books, called the original poll books of the laſt election, &c., produced by R. A. deputy-clerk of the peace for the eaſt-riding of the ſaid county, and which were delivered over to him, by the high ſheriff of the ſaid

ie petitioner being a priſoner for debt in the Fleet n, at the time of the trial of his petition, the chair- , on the application of his counſel, iſſued a warrant to to attend in perſon before the committee[d].

Order for the petitioner's attendance from priſon.

ıe counſel for the petitioner propoſed to prove that the ning officers had continued the poll open only ſix hours, ıd of ſeven, as required by ſt. 25 G. 3. c. 84. ſ. 3. and ıntended that the particular ſtatute, 11 G. 1. c. 18. ; ſilent as to the duration of the poll for each day, it ıithin the general direction of the ſtatute of G. 3. The ſel for the ſitting Members denied that any part of the ; G. 3. c. 84. extended to elections in the city of lon, which remained excluſively ſubject to the regu- ıs of the ſt. 11 G. 1. They alſo contended, that, ſhould committee be of opinion, that the ſt. 25 G. 3. applied e preſent queſtion, the neglect to comply with that *tory* clauſe, would not afford a ground to avoid the elec- unleſs ſome particular miſchief could be ſhewn to reſulted from it: and they cited a MS note of the caſe olcheſter, 1789[e]. They further inſiſted, that the peti- r was not entitled to avail himſelf of this matter, not ıg ſtated it in his petition. The petitioner ſtated

Petitioner confined to his petition.

St. 25 G. 3. c. 84. See ſ. 9.

Directory ſtatute.

County, in open court, at the r-ſeſſions of the peace for the ſaid , about two months after the ction, as the original poll taken ſaid election, and which have ept by him, the ſaid deputy clerk peace, ever ſince, among the re- of the ſeſſions of the peace for the ling, the ſaid books not being de- over by the ſaid ſheriff within ne, nor upon oath, as required by t of the 10th year of the reign of ne queen, for the more effectual ting fraudulent conveyances, in to multiply votes for electing ts of ſhires to ſerve in Parlia- be admitted in evidence. In ſe of Bucks, 12 Mar. 1727, the of the peace being called as the itneſs for the petitioner, produced 18 paper books, which he ſaid were delivered to him by the under-ſheriff, as the poll-books taken at the election, that they were taken at different places, ſome by the ſheriff's agents, and others by agents for the candidates; but he could not diſtinguiſh, or ſay, which of them made the ſheriff's poll. And none of the ſaid books being either ſworn to by the ſheriff, or atteſted by him, the committee did not think, they had ſufficient evidence to proceed upon; and reſolved that the ſitting Member was duly elected; and the Houſe negatived a motion made to re-commit their reſolutions." 21 Journ. 80.

[d] See *ante*, p. 136.

[e] *Ante*, vol. 1. 506. and ſee *ib.* 430. 3 Lud. 3. 1 Fra. 377. *ante*, vol. 1. 43.

" that the poll commenced again at nine o'clock in the mornings of Wedneſday the 7th of July, and of Thurſday the 8th, and Friday the 9th of the ſame July 1802, and cloſed on each of thoſe days at the hour of three o'clock in the afternoon of the ſaid reſpective days;" but no complaint was made that the time was ſhorter than is allowed by law. It was ſaid that this ſtatement was matter of recital only and not of complaint, and could not have been meant to be underſtood as a ground of charge againſt the returning officers: and the caſe of Petersfield 1775[f] was cited, where the petitioner was reſtrained from giving evidence (as the ground of ſetting aſide the election) that the ſitting Member was ſheriff of the county, at the time of his election; there being no expreſs allegation to that effect in the petition; although in the introductory part of the petition, it was ſtated that Sir A. H. Bart. *High-Sheriff for the county* of H. had been a candidate at the election, &c. It was anſwered, on the part of the petitioner, as to the laſt objection, that in the preſent caſe there was an expreſs allegation that the poll commenced at nine and cloſed at three; and that although no ſpecific complaint had been made againſt the returning officer on this account, nor was it alleged that the election was therefore void, yet theſe were only concluſions to be drawn from the fact ſtated, from which, if true, it clearly appeared that the ſt. 25 G. 3. had been diſobeyed: that the concluding words of the petition " *therefore* praying the Houſe to give ſuch orders touching the premiſes as ſhall be deemed right, and according to the rules of the Houſe, ſo that a proper return may be made of Members to ſerve in the preſent Parliament for the ſaid city," referred to the whole antecedent part of the petition, and might be connected with any matter of fact therein ſtated: and the caſe of Cricklade 1776[g] was cited, where the petitioners were permitted to enter into the proof of bribery by the ſitting Member, it being comprehended in the words *corrupt practices* alleged in the petition.

[f] 3 Ld. Gl. 3. [g] 4 Ld. Gl. 55.

The

: committee determined, that the counſel for the pe-
r ſhould not give evidence of the number of hours
:ach day in polling, that not being ſtated as matter of
aint in the petition [b].

the caſe of Caermarthenſhire,
. 1. p. 289; and the authorities
to in the note. In the caſe of
1770, 32 Journ. 43,705, the
ng candidate complained that
g Members had procured them-
be returned by means of bribery
:r undue and illegal practices;
ors in his intereſt complained
had been guilty of bribery, &c.
by means of theſe and other
undue, and illegal practices,
influence and procure a major-
ıtes, although the greateſt part
votes were illegal, and ought
have been taken; the Houſe
that the petitioners ſhould
not be permitted to prove that many of the perſons who voted for the ſitting Members, were not legally entitled to vote, 'there being no allegation in either of the petitions, to warrant their producing ſuch evidence.' Northampton, 1769. 32 Journ. 55, 183. Mr. Howe complained that the returning officers, from the commencement of the canvaſs, gave notorious and repeated proofs of their attachment to the ſitting Members: The Houſe permitted the petitioners under this allegation, to give evidence of their partiality and attachment to the ſitting Members, before Mr. Howe became a candidate for the borough.

CASE XLVII.

THE CITY OF COVENTRY.

etition was preſented by certain electors againſt the
election of Mr. Moore [a]: no evidence being brought
port the allegations thereof, Mr. Moore was reported
duly elected, 3 Mar. 1804.

ſented 19 Ap., renewed, 28 Nov. 1803. The Committee was appointed,
1804.

CASE XLVIII.

THE BOROUGH OF ILCHESTER IN THE COUNTY OF SOMERSET.

IN conſequence of the election of Sir W. Manners having been declared void,[a] another election was held, and Mr. John Manners was returned. Mr. Ogle petitioned againſt his return, 29 Mar. 1804,[b], and a motion having been negatived for diſcharging the order for taking the petition into conſideration, (13 Apr.) the committee was appointed 20 Apr. On the 23d, they reported the ſitting member to be duly elected, and the petition to be frivolous and vexatious. The counſel for the ſitting member admitted that a notice had been given to him of the petitioner's intention not to give evidence in ſupport of his petition; and left it to the committee to decide as they ſhould think proper upon this queſtion.

[a] See ante, p. 251.

[b] Preſented, 29th Mar. 1804.

CASE XLIX.

THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 26th of April 1804, and conſiſted of the following Members:

Rt. Hon. Wm. Windham, *Chairman.*	Sir Matth. Bloxam, Knt.	
Rich. Gervas Ker, Eſq.	Hon. Cha. Kinnaird.	
Ja. Martin Lloyd, Eſq.	Cha. M. Ormſby, Eſq.	
Joſ. Holden Strutt, Eſq.	Robt Holt Leigh, Eſq.	
Hen. Joddrell, Eſq.	Hon. Cha. Ja. Fox, for the petitioners to oppoſe the right reported in 1803.	Nominees.
John Prinſep, Eſq.		
Sir Rob. Barclay, Bart.		
Viſc. Loftus.		
Matth. Ruſſell, Eſq.	Wm. Sturges Bourne, Eſq. for the petitioners to defend that right.	

Petitioners againſt the right reported by the laſt committee: 1. Samuel Mitchell, and others. 2. Joſeph Childs.

Petitioners to defend the right: Hon. Wm. Eliot, and others.

Counſel for Mr. Mitchell and others: Mr. Piggott; Mr. Adam; in the abſence of either, Mr. Serjt. Runnington.

for Mr. Childs: Mr. Pell.

for Mr. Eliot, and others: Mr. Plumer; Mr Serjt. Lens; in the abſence of either, Mr. Hobhouſe.

THIS was a petition of appeal under ſt. 28 G. 3, c. 52. ſ. 26[a] againſt the right of election determined by the ſelect committee in 1803, and reported by them to the Houſe, Petition of appeal.

[a] St. 28 G. 3. c. 52. ſ. 26. And be it enacted, That it ſhall and may be lawful for any perſon or perſons at any time within twelve calendar months after the day on which ſuch report ſhall have been made to the Houſe, or within fourteen days after the day of the commencement of the next Seſſion of Parliament, after that in which ſuch report ſhall have been made to the Houſe, to petition the Houſe to be admitted as a party or parties to oppoſe that right of election, or of chuſing, nominating, or appointing the returning officer, or returning officers, who is or are to make return of ſuch election, which ſhall have been deemed valid in the judgment of ſuch committee.

S. 27. And be it enacted, That if no ſuch petition ſhall be ſo preſented within the time above-limited for preſenting the

Houſe, 10 Mar. in that year. See the caſe reported, vol. i. p. 110.

Petition to oppoſe the right reported.

The petition of Samuel Mitchell and others [b], ſtated the election to have been held 6 July 1802; that the Hon. John Eliot, and the Hon. W. Eliot had been returned at that election; and that Mr. Sheridan and Mr. Ogilvie, the unſucceſsful candidates, and alſo certain electors, had petitioned againſt their return; that the committee appointed to try the merits of the election, required the parties to deliver in ſtatements of the rights of election for which they

the ſame, the ſaid judgment of ſuch committee on ſuch queſtion or queſtions, ſhall be held and taken to be final and concluſive in all ſubſequent elections of Members of Parliament for that place, to which the ſame ſhall relate, and to all intents and purpoſes whatſoever; any uſage to the contrary notwithſtanding

S. 28. And be it enacted, That whenever any ſuch petition ſhall be ſo preſented, a day and hour ſhall be appointed by the Houſe, for taking the ſame into conſideration; ſo that the ſpace of forty days at the leaſt ſhall always intervene between the day of preſenting ſuch petition, and the day appointed by the Houſe for taking the ſame into conſideration; and notice of ſuch day and hour ſhall be inſerted, by order of the Speaker, in the next London Gazette, and ſhall alſo be ſent by him to the Sheriff, or other returning officer for the place to which ſuch petition ſhall relate; and a true copy of ſuch notice ſhall by the ſaid Sheriff or other returning officer, be forthwith affixed to the doors of the County-hall, or Town-hall, or of the Pariſh Church neareſt to the place where ſuch election has uſually been held.

S. 29. And be it enacted, That it ſhall and may be lawful for any perſon or perſons, at any time before the day ſo appointed for taking ſuch petition into conſideration, to petition the Houſe to be admitted as a party or parties to defend ſuch right of election, or of chuſing, nominating, or appointing the returning officer, or returning officers; and ſuch perſon or perſons ſhall thereupon be ſo admitted, and ſhall be conſidered as ſuch to all intents and purpoſes whatever.

S. 30. And be it enacted, That at the hour appointed by the Houſe for taking ſuch petition into ſuch conſideration, the Houſe ſhall proceed to appoint a ſelect committee to try the merits thereof, according to the directions of the above recited acts, and of this act; and ſuch ſelect committee ſhall be ſworn to try and determine the merits of ſuch petition, ſo far as the ſame relate to any queſtion or queſtions reſpecting the right of election, for the place to which the petition ſhall relate, or reſpecting the right of appointing, nominating, or chuſing the returning officer, or returning officers, who are to make return of ſuch election; and the determination of ſuch committee on ſuch queſtion or queſtions, ſhall be entered on the journals of the Houſe, and ſhall be held and taken to be final and concluſive in all ſubſequent elections of Members of Parliament for that place, to which the ſame ſhall relate, and to all intents and purpoſes whatever, any uſage to the contrary notwithſtanding.

[b] Preſented 20th Dec. 1803.

&c.

reſpectively contended: and finally, that they determined, and reported to the Houſe, that the right was not in the inhabitants paying or liable to pay ſcot and lot, but in the mayor and burgeſſes of the borough: the petitioners therefore, being adviſed that the ſaid reſolutions and determination of the ſaid ſelect committee of the Houſe, on the ſaid right of election, was contrary to law, prayed that they might be admitted as parties to oppoſe that right of election which had been deemed valid in the judgment of the ſaid committee as aforeſaid, and to ſupport and eſtabliſh the ſaid right of election contended for by the petitioners before the ſaid ſelect committee, and which was negatived by the ſaid ſelect committee of the Houſe, or ſuch other right as ſhould be conſiſtent with law, and that ſuch relief might be granted as the juſtice of the caſe might require.

The petitioner Mr. Joſeph Childs, after reciting the former proceedings, ſtated, that he humbly conceived, that the right of election determined by the laſt committee was not the right of election for the borough, but that the right ſet forth in the ſtatement of Mr. Sheridan and Mr. Ogilvie, was the legal right: and therefore prayed the Houſe to admit him as a party to oppoſe that right of election, that had been deemed valid in the judgment of the ſaid ſelect committee, &c.

The petition of the[d] Hon. William Eliot and others, after ſtating in like manner the determination of the former committee upon the right of election, and referring to the petitions abovementioned againſt that determination; ſtated, that "they were adviſed, and humbly contended, that the right of election of burgeſſes to ſerve in parliament for the ſaid borough was in the mayor and burgeſſes of the ſaid borough, according to the determination of the ſaid ſelect committee; and therefore prayed the Houſe, that they might be admitted parties to defend and ſupport the right of election that had been deemed valid in the judgment of the ſaid ſelect committee as aforeſaid, and to oppoſe the right of election for which the ſaid other petitioners contended be- Petition to defend the right reported.

[c] Preſented, 20 Dec. 1803.

[d] Preſented, 3 Mar. 1804.

fore

fore the ſaid ſelect committee, or any other right which might be attempted to be eſtabliſhed by them, or any of them, and that ſuch relief might be granted to the petitioners as the juſtice of the caſe might require."

Delivering ſtatements of the right.

The firſt queſtion which aroſe before this committee, related to delivering in ſtatements of the different rights of election for which the reſpective parties contended. The counſel for Mr. Mitchell, &c. produced their ſtatement as ſoon as the petitions had been read: they ſtated the right to be, in the inhabitants of the borough, paying, or liable to pay ſcot and lot. The counſel for Mr. Childs ſtated the right to be "in the inhabitants of the borough, incorporated by the name of the mayor and burgeſſes of the borough of Liſkeard." The counſel for Mr. Eliot objected to this ſtatement, as being different from the right ſet forth in the petition of Mr. Childs. They ſaid, that perhaps it was not neceſſary for the petitioner to have ſtated any right in his petition; but that having done ſo, he was bound by it, and could not now ſet up another, and a different right, which the oppoſite party had not prepared themſelves to controvert; and they referred to the common caſe of petitions againſt elections and returns, where it had often been held that although a petition drawn up in general terms is ſufficient, yet if the petitioner will ſtate his complaint ſpecially, he is confined to the proof of his particular allegations [e]. The counſel for Mr. Childs agreed that it was unneceſſary to have ſtated any right in the petition; but contended, that the material part of his client's petition was the prayer to be permitted to oppoſe the right determined upon by the laſt committee: that it was competent to him to do ſo by any means, either by ſhewing, negatively, that ſuch was not the right, or by ſetting up any other right in oppoſition thereto: he denied, that he was obliged to give in any ſtatement at all in this ſtage of the cauſe, having a right to reſerve his ſtatement till the opening of his caſe [f]. And

Statement of the oppoſing petitioners.

Statement of a right different from that ſet forth in the petition, rejected.

[e] See *ante*, p. 4, Vol. I. p. 289.

[f] Mr. Childs had preſented himſelf as a diſtinct party before the Houſe; but had waived his claim to the privilege of ſtriking the committee, &c. admitting that although he might be unconnected with the former petitioners their intereſts were not adverſe. See *ante*, Vol. I. p. xlvii. Introd.

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he obſerved that this committee would not be confined to the ſtatements of either party, but would be at liberty to reject them all, and to decide upon any other right of election which they thought proper, differing either partially or totally from any of thoſe ſubmitted to them by the parties in their ſtatements [g].

The committee decided that the ſtatements ſhould be delivered in, in the firſt inſtance [h]; and, that Mr. Pell's ſtatement could not be received, but that he was at liberty to deliver in another, if he thought fit. Mr. Pell then, on the part of Mr. Childs, delivered in a ſtatement ſimilar to that which had been delivered in on the part of Mr. Mitchell. The counſel for Mr. Eliot delivered in a ſtatement, in which they alleged the right to be in the mayor and burgeſſes of the borough.

Statements to be delivered, in the firſt inſtance.

Statement of the defending petitioners.

The evidence both on the part of the oppoſing, and of the defending petitioners, was, in a great meaſure, the ſame as that which had been produced upon the former trial: the reader will therefore, upon the preſent occaſion, be referred to the report of that trial [i], to prevent the neceſſity of repeating what is to be found there; and an account will be given in this place of the nature of the evidence on each ſide, with a fuller detail of ſome parts of it, and with the addition of ſuch new proofs as were thought neceſſary by the parties [k] on the preſent trial. The returns given in evidence, were the ſame as upon the former occaſion. Thoſe read on the part of the oppoſing petitioners, were, from 1 Edw. 2. to

Evidence.

Returns.

Evidence for the oppoſing petitioners.

[g] As in the caſe of Stevning, 1792. 47 Journ. 683. Weſtminſter, 1789. 44 Journ. 519.

[h] The ſame courſe was ſaid to have been purſued in the caſe of Steyning 1792. Statements were alſo delivered in, immediately after reading the petitions, in the caſes of Fowey, 1792, and of Malmſbury, 1797, See *poſt*, appendix. In the caſe of Carliſle, 1795, the ſtatements were not given in till the ſecond day of the trial, when the oppoſing petitioners had already given much of their evidence.

[i] *Ante*, Vol I. p. 111.

[k] As each of the petitioners to oppoſe the right reported by the ſelect committee, contended, in fact, for the ſame right, they will be conſidered in the courſe of this report, as the ſame party; and to prevent circumlocution, they will be termed the oppoſing petitioners, and the other party, the defending petitioners.

12 H. 4.[1]; (the names of the members were read from 4 Prynne, 1039) and the returns 1 & 2 P. & M. 4 & 5 P. & M. 25 Ap. 1 Car. 1. and 2 W. & M. The return in the printed report appearing to have been taken from a copy not entirely accurate, and ſome more of the words of it having lately been rendered legible, a new copy of it is here given; with a caution to the reader, to obſerve, that it is not taken immediately from the original itſelf, and that there is no ſmall difficulty in copying an inſtrument ſo mutilated.

4 & 5 P. & M. This Indenture made the x daye of January * * * * * Fourth * * * * * eres * * * * * of God Kyng & Quene of Englond Spayne Fraunce bothe Cyc * * * * Jer * * * * lem * * * * * * * * * * * * * of the Faith Archduks of Auſtria Duks of Myllayne Burgundy & Brabant Countes of * * * * * * * * Flaunders & Tyroll Betwene John Bevyll Eſquire Sheryfe of the County of * * * * * * * * * * thone pte & Willm Coryton Mayor of the Towne and Borough of Leſkerd and the * * * * * * ef * * of * ſame Borough of thother pt Wytneſſyth that the hole Towne & Burgs of the Borough * * * * * ſayde Have ordayned Coſtitutyd & Deputyd o[r] Truſty & Welbelovyd Willm Coryton * * * * * as aforeſaide & John Gayer Gent. to be y[e] Burgeſes of y[e] ſame Borough for the Tyme of this p'ſent Seſſyon of Plyment by this p'ſents. In Wytneſſe whereof we have aſſygned this Indentur w[th] o[r] Seales Yeven the Daye & Yere aboveſayd. W * * * * * ton.

[1] The liſt is continued by Prynne down to 7 Edw. 4. which is the firſt ſeparate return for Liſkeard. See *ante*, Vol. I. p. 119. Mr. Lemon in his evidence ſtated, that the returns of Members for boroughs, by Schedules, continued till the reign of H. 4. It is however quite clear, that many were returned by way of Schedule, long afterwards. See ante Vol. I. p. 409. The latter Schedules were annexed to one indenture between the Sheriff on one partand ſeveral electors of each borough on the other. Mr. Brady has given the form of ſuch an indenture, 2 H. 5. Appendix, p. 31. p. 29. On the other hand, he gives inſtances of diſtinct returns for boroughs, ſo early as 26 Edw. 1. p. 133. See 1 Ld. Gl. 450. And Prynne's *Brev. Parl. Red.* 252, 256, 261. *cit. ibid.*

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The ſame charters were given in evidence as were produced on the former trial, with the addition of a charter of Edward the Black Prince, (11 Sept. 28 Edw. 3.) under his privy ſeal, granting to the borough an immunity from toll. This charter was produced in evidence by the counſel for the defending petitioners. Charters.

The following entries were read from a book, called the Conſtitution book; they are adverted to, *ante*, vol. i. p. 116.: but it is thought better to give them in this place at greater length. Conſtitutions.

'Burgus de Lyſcard, al's Lyſkerrett. Conſtitutions made and agreed upon in the common hall of the borough aforeſaid at the leet or law day there, holden the ninth day of April, in the thirtieth year of the reign of our Sovereign Lady Elizabeth, by the grace of God of England, France, and Ireland, Queen, defender of the Faith, &c., for the better government and direction of the burgeſſes and inhabitants there, for the ſuppreſſion of ſundry offences and enormities, to the maintenance of peace and quietneſs, and to the confirmation of the wealth public of the ſaid town; by Peter Mark, Gent. mayor of the ſaid town and borough aforeſaid, and the eight chief councillors and governors of the ſaid borough, according to a certain clauſe unto them by her ſaid Majeſty's charter bearing date at Theobalds the twenty-ſixth day of July, in the nine-and-twentieth year of her Majeſty's reign, amongſt other things made and granted; together with the general conſent of the reſidue of the burgeſſes and inhabitants then alſo confirmed, as followeth:

1. '*Imprimis*, for the better government of the ſaid town and upholding of the good eſtate thereof, it is generally agreed, that nine of the chief inhabitants, whoſe names are underwritten, ſhall be henceforth reputed and taken to be the ſuperior burgeſſes, chief maſters, councillors, and governors of the ſaid town. Superior burgeſſes.

The names follow [m].

[m] There are ſeveral leaſes dated 24th Oct. 29 Eliz. in which theſe perſons are by name the granting parties, and are deſcribed as the chief burgeſſes; two of their names appear in a grant 5 May, 8 Eliz.

Inferior burgeſſes.

2. 'Item, farther it is likewiſe agreed, that for the [illegible] aſſiſtance of the government aforeſaid, and for the [illegible] confirmation of the conſtitutions now made, or hereafter to be made, to the maintenance of the general unity, peace and concord of the burgeſſes and inhabitants aforeſaid, to the glory of God and the public benefit of this [illegible] borough, that there ſhall be fifteen others of the moſt [illegible] and moſt ſufficient of the reſidue burgeſſes, whoſe names are likewiſe underwritten, which ſhall henceforth be reputed inferior burgeſſes, as the homagers at law days, and alſo enabled to divers other purpoſes as are hereafter mentioned, touching the ſtate of the town and borough aforeſaid.

The names follow.

Amotion of burgeſſes.

3. 'Item, it is likewiſe generally agreed, that none of the perſons before named, as well ſuperior as inferior burgeſſes, ſhall be henceforth altered or amoved, unleſs it be in reſpect of death, or in reſpect of ſome other imperfection or miſdemeanor, or departure to dwell out of the ſaid town and borough, to be adjudged and determined by the mayor for the time being, and the reſidue of the ſaid ſuperior and inferior burgeſſes, or by the mayor for the time being, five of the ſuperior burgeſſes, and eight of the inferior burgeſſes for the time likewiſe being at the leaſt.

Burgeſſes to bear certain offices, and not ſtrangers.

4. 'Item, it is like manner agreed, and by general conſent of all the burgeſſes and inhabitants fully concluded, that no perſon or perſons whatſoever ſhall henceforth be choſen, elected, or nominated, mayor, conſtable, collector, clerk of the market, ſerjeant at the mace, or any other inferior officer whatſoever within the ſaid town and borough aforeſaid, heretofore uſed, unleſs ſuch officer and officers be at the time of ſuch choice, election, or nomination, a burgeſs commorant, inhabitant, and dwelling, within the town aforeſaid, and not any longer to continue in any ſuch office or offices whatſoever, than he or they be burgeſſes commorants, inhabiting and dwelling within the ſaid town as aforeſaid.

Offices to be holden *durante bene placito.*

5. 'Item, we do conſtitute and ordain, that all offices and officers which are to be appointed and diſpoſed by the town; and

and not by the mayor only (as incident to his office), ſhall henceforth be and remain but only *durante bene placito*, and that alſo none of the chief maſters and governors of the ſaid town for the time being ſhall henceforth by himſelf, or by his aſſignee or deputy, exerciſe or uſe any ſuch office, or be admitted any ſuch officer contrary to the true intent hereof upon pain of diſfranchiſement, and ſuch other pains and puniſhments as ſhall be adjudgeable.

The number by whom the conſtitutions are either to be concluded, or annulled.

6. 'Item, we do likewiſe conſtitute and ordain that no laws, orders, or conſtitutions whatſoever, to be made henceforth for the government of the ſaid town (as to be deemed available and forceable) are to be obeyed and obſerved, unleſs the ſame be agreed by the mayor, five of the eight of the maſters and governors of the ſaid town, and eight of the fifteen of the inferior burgeſſes of the ſaid town for the time being; and that as well by the like number, and by the like perſons, all whatſoever laws, orders, and conſtitutions, to be altered, and diſannulled, and not otherwiſe; as alſo all ambiguities, queſtions, and doubts of any whatſoever conſtitutions to be adjudged, determined, and decided.

Cleanſing of the Streets.

9. 'Item, we do conſtitute, that every inhabitant ſhall from time to time againſt his own houſe and ground and ward, until the midſt of the ſtreet, make and cleanſe the ſtreet and ward, and that no inhabitant ſhall lay any rubble, dung, or any thing that ſhall be filthy, troubleſome, unſeemly, or indecent in the ſtreets. But ſhall at his own charges remove the ſame, and the pig-drivers to be kennel-rakers for the cleanſing againſt the town lands and walls, and all the ſtreets and forewards at the leaſt every Saturday to be cleanſed.

Tillage of Gardens.

14. 'Item, we do conſtitute that every inhabitant, not charged to the ſubſidie, ſhall plant and keep in their gardens, from time to time, turneps, coles, and cabbage, cole parſneps, leeks, onions, and carrots, and other like roots for their better relief.

The Mayor's accounts.

17. 'Item, the mayor's accompts to be made in the town-hall before the mayor, his brethren, and the reſt of the chief burgeſſes and inhabitants, the Thurſday after Martin's day, as it hath been accuſtomed, or elſe to be impriſoned until

until he accompt, and ſatisfy his arrearages, or ſuch other fine and puniſhment as by the ſaid number of governors ſhall be adjudgeable, without ſpecial licence and conſent of the number aforeſaid firſt obtained to the contrary.

Grants and leaſes of the town lands.

18. 'Item, it is agreed and finally concluded that no leaſe, eſtate, or grant whatſoever henceforth ſhall be made or aſſented unto, of any the town lands or livings whatſoever, but for three lives, or one-and-twenty years, or for fourſcore and nineteen years determinable upon three lives, and that in poſſeſſion; and alſo, that all ſuch leaſes, eſtates, and grants whatſoever, ſhall be made and granted in open court by the general aſſent and conſent of the mayor for the time being and the whole corporation, or by the aſſent and conſent of the mayor for the time being, ſix of his chief brethren and maſters, and thirteen of the ſaid fifteen for the time being, and not otherwiſe; except it be ſome leaſe for trial of the title of any lands in controverſy, and all leaſes, eſtates, and grants in other ſort made and granted ſhall be henceforth utterly void, and ſuch perſon and perſons ſo attempting either in the procuring or conſenting to any other manner of leaſe, eſtate, or grant, to be diſfranchiſed.

Infringement of the Liberties.

22. 'Item, we do conſtitute, that if any inhabitant do break or go about to break, loſe, or infringe any privilege, liberty, authority, juriſdiction, lands, or hereditaments had, uſed, or unto us granted, he to be grievouſly fined and puniſhed, or otherwiſe diſfranchiſed at the diſcretion of the number of the governors aforeſaid.

Exceſs of Toll, and withdrawing of griſts.

23. 'Item, if the miller be convicted, by any lawful perſon by oath of exceſſive toll or miſuſer of any griſt, or withdrawing any ſuitor through his negligence, to be fined forty-pence according to the old conſtitution, and the miller to be ſworn at the law days, and to be impriſoned for his fine, until it be paid, and likewiſe for them that withdraw their griſt and be convicted by the miller's oath, or any other lawful perſon, to pay the value of the toll, and be impriſoned for the ſame until it be paid.

Impleader of burgeſſes and inhabitants in no foreign court.

25. 'Item, we do agree, as in our charter is expreſſed and granted, that no burgeſs or inhabitant whatſoever ſhall henceforth ſue and implead out of this borough any burgeſs or inhabitant of the ſame in any foreign court, concerning matters

matters determinable within the ſame, upon pain of four pounds, and diſfranchiſement, and ſuch other puniſhment as ſhall be adjudged, and alſo to withdraw any ſuch foreign ſuit at the coſts and charges of ſuch offender or offenders.

27. 'Item, it is agreed that every burgeſs ſhall once every year at the uſual and accuſtomed time thereof, truly pay one penny of ſilver in teſtification of his burgeſsſhip [n], and all and every other perſon and perſons as burgeſs whatſoever which ſhall not accordingly either by himſelf or his aſſigns make ſuch payment, or refuſe to make, they ſhall not be admitted or accounted any longer as burgeſs, but to be utterly thereof debarred of what condition or eſtate ſoever they be. The manner of the continuance of burgeſſes, and diſcontinuance.

28. 'Item, it is agreed that if any burgeſs or other inhabitant whatſoever, do receive or admit any ſtranger to dwell in any of their houſes within the ſaid borough, without licence of the mayor, five of the maſters, and eight of the fifteen, firſt had, and do not remove ſuch ſtranger within one quarter of a year after warning by the mayor for the time being given, ſhall forfeit for every ſuch offence ten pounds. Avoidance of ſtrangers.

29. 'Item, it is agreed that every town-born child ſhall pay for his fine of burgeſsſhip five ſhillings, and every eſtranger thirteen ſhillings and four-pence. The fines of burgeſſes.

20th Oct. 43 Eliz.

'Whereas the farmers and leſſees unto the mayor and burgeſſes of this borough have been heretofore accuſtomed to have and receive, and have had and received of every butcher and victualler which doth ſell any victuals or other wares on any Saturday in the ſhops, under the appentices or before the door of any burgeſs or inhabitant of this borough, the third penny and part for every beef, half beef, and quarter of a beef, and ſo for every mutton, veal, pork, lamb, and other victuals whatſoever, ſold in ſtalls or ſhops according to the rate as the ſaid farmers and leſſees have had and received of butchers, victuallers and others, which The collection of the third penny. *Quære.*

[n] From entries in the Innocent's court book, (ſee ante Vol. I. p. 116.) it appeared that the ſum of 9*s.* 4*d.* was collected for burgeſs-pence, 28 Dec. 1692, 10*s.* 9*d.* 28 Dec. 1703, 3*s.* 3*d.* in 1773. The number of burgeſſes therefore on the firſt of theſe days, was 112, on the ſecond, 129, on the third, 39.

did ſtand in the town ſtandings, ſhops or rooms; for the better confirmation whereof, and for the more certainty in like caſes hereafter, we John Hunt the younger, mayor, John Voſper Benedict Piper, John Hunt the elder, Thomas Sampſon, Thomas Fuidge, and Thomas Sane, ſix of the chief burgeſſes and council of the borough aforeſaid, do conſtitute and ordain, that the farmers and leſſees to the mayor and burgeſſes, ſhall for ever hereafter have, receive, and take the third penny for every poll as is before recited, without denial of any burgeſs or inhabitant within the borough aforeſaid; upon pain that every burgeſs or inhabitant refuſing or denying the performance thereof to be utterly diſfranchiſed, and to pay twelve pence for every ſuch refuſal as aforeſaid, to be levied of their goods lands and tenements within the borough aforeſaid, by virtue of a proceſs unto the ſerjeants of the mace or one of them for the time being, under the mayor his hand and ſeal for the time being directed.

Quære.

Annulled, 23 Oct. 8 Jac. 1. A. D. 1610.

Agreement to keep ſecrets.

18 May, 30 Car. 2. A. D. 1680. 'It is jointly agreed and conſented unto (in the council chamber) by us the mayor, recorder, and the reſt of the magiſtrates of the ſaid borough, and we do faithfully promiſe and engage each to other, wholly to conceal and keep ſecret all matters and things by and between us treated of and mutually agreed on, upon pain of diſfranchiſing him and them that ſhall reveal or diſcover the ſame, or any part thereof.

Quo warranto, 36 Car. 2.

'In the thirty-ſixth year of the reign of our ſovereign lord King Charles the Second, a writ of *quo warranto* was brought againſt the borough of Liſkerret *alias* Liſkeard in the county of Cornwall, a true copy whereof doth here follow, *viz.* (Here follows the writ.)

'When this *quo warranto* was brought, William Dunkin, Gent. was mayor, after whom ſucceeded Emanuel Pyper, Gent.; upon advice taken, it was thought fit not to contend or plead to the ſaid writ, but to ſubmit to his Majeſty's royal grace and favor, and thereupon the mayor and capital burgeſſes did under their hands and common ſeal ſurrender their liberties, franchiſes, and privileges into his Majeſty's hands,

ands, which ſurrender was made in the behalf of his Ma-
ſty to the Right Hon. John Earl of Bath, thereunto autho-
ſed, then in Plymouth for the ſame purpoſe ſent by his
ajeſty; whereupon in the term of St. Hilary next, the
wn employed the ſaid Mr. Pyper then mayor to London
bout the ſame, who petitioned his Majeſty King Charles
r a new charter, and for reſtoring the ſaid borough to
eir ancient liberties, which they had either by preſcription
r by any other ways by former charters from his Majeſty's
oyal predeceſſors, Kings and Queens of this realm, or
om the Dukes or Earls of Cornwall, which petition his
ajeſty was moſt graciouſly pleaſed to accept and grant,
membering when he was Duke of Cornwall, the enter-
inment he received in the ſaid town, in the time of the
ivil war and rebellion, and did recommend the ſame to the
arl of Sunderland, then principal Secretary of State;
ut before the ſame could be perfected (it pleaſed Almighty
God) that on the ſecond day of February being candlemas
day 1684, in the morning his ſacred Majeſty was ſuddenly
taken ſick, and as it were dead, and died that week to the
univerſal grief of all his good ſubjects: whereupon James
Duke of York and Albany, his Majeſty's only brother was im-
mediately proclaimed king, by the name of James the Second;
this King Charles the Second leaving no lawfull iſſue behind
him: upon which a new addreſs and petition was preſented
to King James his ſaid Majeſty in behalf of the ſaid town,
by the Earl of Bath, the Lord Arundell of Treriſe, and
the ſaid mayor, in the Privy Garden at Whitehall; who did
graciouſly receive the ſame, the mayor kiſſing his Majeſty's
hand; and afterwards in purſuance thereof a new charter
was by and in the name of King James the Second, under
the great ſeal of England, granted unto the ſaid mayor and
burgeſſes, bearing date at Weſtminſter, the ſixteenth day
March, in the firſt year of his reign, wherein being in-
formed of the loyalty of the ſaid town in the late rebellious
civil war, there coming to the ſaid town in purſuit of the
Earl of Eſſex, General of the Parliament's Forces and
Army, the late pious King Charles the Firſt, and King

New charter by K. James 2d.

Charles the Second then Duke of Cornwall, theſe ſpecial words are inſerted,

" *Nos igitur præmiſſa conſiderantes et ex notitiâ noſtrâ pro certo habentes, quod burgenſes burgi illius patri noſtro præcariſſimo in bello contra peſſimum genus rebellorum ſeſe fideliter reddiderunt, et domos et familias relinquentes in memorabili prælio et victoriâ de* Bradock Down, *anno domini* 1642, *in exercitu Cornubienſi præcariſſimi patris noſtri fortiter pugnavêre in defenſione dicti præcariſſimi patris noſtri regis, quanquam uxores et familiæ eorum tempore ſub poteſtate rebellorum remanſêre.*"

[Mr. Hoblyn, an alderman of Liſkeard, a witneſs on behalf of the oppoſing petitioners, related, that this charter had been taken out of the cheſt of the corporation about the year 1793, and carried to Lord Eliot's, at Port Eliot, to be examined; a *ſubpœna duces tecum* having been ſerved on the town-clerk to produce it at the enſuing aſſiſes. Since that time it has not been heard of. Mr. H. added that this charter was never regarded by the corporation, but looked upon as waſte paper. And Mr. Carthew ſaid, that the charter of Q. Eliz. had always been conſidered to be in force, and was acted upon.]

By this charter 21 perſons are declared to be free of the borough. Moſt of them are perſons of high rank.

'At the Court at Whitehall, 23d June, 1688. By the King's moſt excellent Majeſty, and the Lords of his Majeſty's moſt honorable Privy Council.

Removal of certain burgeſſes.

'Whereas by the charter granted to the borough of Liſkeard, in the County of Cornwall, a power is reſerved to his Majeſty by his order in council, to remove from their employments any officers in the ſaid borough, his Majeſty in council is pleaſed to order, and it is hereby ordered, that Emanuel Pyper, Eſq. and capital burgeſs, Thomas Pyper, Samuel Longford, and Henry Helliard, capital burgeſſes, Bodvill Earl of Radnor, Jonathan Trelawney, John Arundell of Tremedarth, Richard Eriſſey, and Sir John Coryton, Baronet, freemen and burgeſſes, be and they are hereby removed and diſplaced from their ſaid offices, in the ſaid borough of Liſkeard.

W. BRIDGEMAN.

'When

'When an inferior perſon, tradeſman, or one that ſerved an apprentice within the borough is admitted a burgeſs, the form of the oath is,

"You ſhall dutifully and obediently behave yourſelf to the mayor and magiſtrates of this borough; you ſhall alſo be contributory to all ſuch rates, taxes, and talliages as ſhall be reaſonably and lawfully taxed and aſſeſſed upon you; you ſhall alſo be aiding and aſſiſting to the mayor and other officers of this borough in keeping and preſerving of the King's Majeſty's peace; you ſhall not do any act which may be prejudicial to the liberties, franchiſes, or inheritance of this borough or corporation, but ſhall give your beſt counſel to the mayor and corporation when deſired, and ſhall do and perform all and every other thing as other burgeſſes of this borough do or of right ought to do during ſuch time as you ſhall remain a burgeſs within this borough, as near as God ſhall give you grace; ſo help you God." Burgeſs's oath.

1 Oct. 1751. 'Whereas by the uſage and conſtitutions of this borough, no perſon can be lawfully elected freeman thereof but at an aſſembly of the mayor and capital burgeſſes, and with the conſent of the major part of them; in order to preſerve ſuch uſage inviolate, and to deter any mayor from claiming to himſelf the privilege of ſwearing of freemen, and from preſuming to exerciſe ſuch privilege without the concurrence of the capital burgeſſes; we the mayor and capital burgeſſes of this borough do hereby, and by virtue of our power of making bye-laws, ordain and enact, that no perſon from henceforth ſhall be ſworn a freeman of this borough without the concurrence of the majority of the mayor and capital burgeſſes thereof then in being; and if the preſent or any future mayor or his deputy ſhall ſwear or admit any perſon a freeman of this borough not elected and choſen by a majority of the mayor and capital burgeſſes of this borough duly aſſembled, ſuch mayor or deputy mayor offending therein ſhall forfeit for every ſuch ſeparate offence the ſum of one hundred pounds, to be recovered by action of debt to be brought in the name of the recorder, or capital ſteward, or town clerk of this borough for the time being; (with coſts of ſuit to be applied to the uſe of the mayor and Mayor alone not to admit burgeſſes.

burgeſſes of this borough;) and the perſon ſo ſworn or admitted ſhall not thereby receive or gain any freedom privilege or advantage incident or belonging to a freeman of the ſaid borough.

22 Oct. 1751. 'We whoſe names are hereunto ſubſcribed, capital burgeſſes of the ſaid borough, do conſent to and approve of the above bye-law in every particular.

Abridgment of charter of Eliz.

'An entry was alſo read from the book of conſtitutions, of an abridgment of Queen Elizabeth's charter, beginning thus: "Elizabeth by the grace of God Queen of England, France, and Ireland, by her Grace's letters patent dated at Theobald's, the 26th day of July, in the 29th year of her Majeſty's reign, granted unto the mayor and burgeſſes of Liſkerret, *als.* Liſkeard, (amongſt divers *new* liberties and privileges) that they ſhould have and enjoy." &c.

For preventing extraordinary expences at the law courts.

A conſtitution made for preventing extraordinary expences at the law courts. 'For prevention of extraordinary expences at the law days held within this borough, which have heretofore been occaſioned by the diſorder of the common burgeſſes, and otherwiſe to the great charges and damage of the town, be it therefore hereby conſtituted, ordained, and agreed on by the mayor, magiſtrates, and capital burgeſſes of this borough in common council aſſembled, that hereafter the mayor for the time being ſhall be allowed for the two law courts but eight pounds, (that is to ſay,) for the law court held after Eaſter for ordinaries forty ſhillings, *viz.* for the magiſtrates and the grand jury, being in all twenty-four, twenty-four ſhillings, and the reſidue for ſuch as it ſhall pleaſe the mayor for the time being to invite or appoint, and twenty ſhillings for extraordinary expences; and for the law court at the election of the new mayor, and the day following, five pounds. And that if there ſhall be any other or more perſons admitted than ſuch as the mayor or the ſteward which the mayor ſhall appoint for ſuch purpoſe, then the houſe where ſuch law days are or ſhall be kept to ſtand to it themſelves. And be it hereby further ordained and conſtituted, that for prevention of the poor to lie at the door at ſuch law days, there ſhall be allowed each law day to be diſtributed in money to the moſt indigent poor within the

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the town ten ſhillings, to be delivered to their houſes, by ſome one of the overſeers of the poor; and that the mayor ſhall not be allowed more than is formerly expreſſed on the paſſing his account for the charges and expences aforeſaid, any conſtitution, uſe, or cuſtom to the contrary in any wiſe notwithſtanding.

They read an entry from Rymer's Fœdera, vol. 2. p. 879. Rymer. from whence it appeared that Edmund Earl of Cornwall died in 1301. They alſo read the following paſſage from Brady on Boroughs, p. 33. "Likewiſe in the charter of Helleſton in Cornwall, 2 *Johan. ut ſit Burgus noſter de Helleſton liber Burgus.*" Brady. See Appendix to Brady, No. 8.

Parole evidence for the oppoſing petitioners.

The following was the ſubſtance of their parol evidence.

Mr. Carthew, the town-clerk, was called to produce the charters, and the other muniments of the borough. He produced a book of admiſſions of freemen, the firſt entry in which was of the year 1758, and the laſt in 1802, and he related who of the preſent corporators were reſident, and who were not. He ſaid, that a court of record was held in the borough every three weeks; that all the inhabitants were ſuitors there; and that any other perſon might ſue there, if the cauſe of action aroſe within the borough.

Upon his croſs-examination by the counſel for the defending petitioners, he gave the following account of the ſtate and government of the borough. In the election of the mayor, the nine capital burgeſſes, (or aldermen) name one perſon, and the free-burgeſſes, whether reſident or not reſident, who have been ſworn upon the grand jury at the court leet, name another, of the capital burgeſſes; and a choice of one of theſe two is made by the whole of the corporation, about 39 in number. A capital burgeſs is choſen by the capital burgeſſes from among the free burgeſſes who have been ſworn at the leet upon the grand jury. The free, or common burgeſſes are elected by the capital burgeſſes, and ſworn in. There is no previous qualification or inchoate right to the office. Some of theſe are ſworn in alſo at the leet, to ſerve on juries, to which they are ſummoned by a warrant from the mayor; theſe are they who

preſent one candidate for the mayoralty. There is no fixed number of them, but they are in general 15, or 16. The inhabitants of the town are about 1500 in number; the diſtinction between them and the burgeſſes is perfectly well known: no inhabitant was ever conſidered, as ſuch, qualified to become a capital burgeſs, nor was any inſtance remembered of any one of them claiming to be admitted as an inhabitant, into the corporation, till Michaelmas 1803, when Mr. Childs (the petitioner) and about 40 more, made a demand in writing to be admitted burgeſſes, and were refuſed.

Revenue of the borough.

It alſo appeared, from the evidence of other witneſſes, called on the part of the oppoſing petitioners, and croſs-examined by the other ſide, that the revenues of the borough ariſe from dues payable in reſpect of ſtalls and weights; from the profits of certain land; from the Boagara mills; and from the tolls of the fair. The freemen pay only half toll; the inhabitants pay full toll. (This diſtinction was, however, denied by ſome of the witneſſes.) The inhabitants formerly conſidered themſelves bound to carry their corn to be ground at the mills; but that practice is now diſcontinued. The poor of that part of the pariſh which lies within the borough, are ſupported from the revenues of the borough. The officers of the borough, ſuch as conſtables, and ſerjeants at mace, are choſen from the inhabitants at large. Mr. Morſhead, who canvaſſed the borough about 40 years ago, and who lived about a mile from it, addreſſed himſelf to none but the freemen.

Mills.

James Fitz ſaid, that the jury at the court-leet was taken from the freemen only; but that he had known inſtances of ſome of the inhabitants at large ſerving on juries at the law-courts, in the trial of actions on contracts.

Reputation.

The evidence of Mr. James Jenkins for the oppoſing petitioners, was very material: he ſaid he had known Mr. Trehawke, a freeman, who had died 14 years ago, in his 82d year: that upon their firſt acquaintance, Mr. Trehawke had informed him, that the right of election at Liſkeard was in the inhabitants who paid ſcot and lot; and that there had formerly been great confuſion in the town at the time

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of elections; for which reaſon the right had been reſtricted to the body who now exerciſe it: that he was ſurpriſed that Lord Eliot's intereſt had not been oppoſed; but that it was probable, if the charter were tranſlated, and underſtood, the eyes of the inhabitants would be opened to their true rights. He added, that he had alſo heard from three or four other aged perſons, ſince deceaſed, that in their younger days, the right had been in the inhabitants, but that it had been altered by Lord Eliot's family. The defending petitioners, afterwards, called ſeveral witneſſes to diſcredit Jenkins's teſtimony.

The evidence for the defending petitioners conſiſted, in the firſt place, of the following written inſtruments. Evidence for the defending petitioners.

The charter of Edward the Black Prince [o], mentioned *ſupra*, p. 281.

Indenture, 4th March, 14 Rich. 2. Witneſſing, that although Thomas Hatchem and W. Deane have enfeoffed the mayor and burgeſſes of Liſkeard and their ſucceſſors of a yearly rent of 20*s*. nevertheleſs, the mayor and burgeſſes will and grant for them and their ſucceſſors, that if W. Deane releaſe to them 4*s*. yearly rent for a common houſe, &c., from thenceforth the ſaid deed of feoffment ſhall loſe its force. "In teſtimony whereof the parties aforeſaid their ſeals interchangeably have put." (Wax of the ſeal decayed.) Ancient deeds, 1391.

On Wedneſday next after the feaſt of the Aſſumption, 15 Rich. 2. a releaſe by Wm. Deane the elder to the mayor and burgeſſes of Liſkeard of a rent of 4*s*. 1392.

2 Nov. 22 Hen. 7. Indenture of leaſe of land between J. F. mayor, and J. R. and others; witneſſing, that the ſaid mayor for him and his ſucceſſors, by the advice and conſent of all the burgeſſes of the ſaid borough, hath let, &c. In witneſs whereof, the ſaid mayor, by the advice and conſent of all the burgeſſes of the ſaid borough, hath put the common ſeal of the ſame borough, &c. 1507.

24 Mar. 2 & 3 P. & M. Releaſe, by Joan Keſt, of her right in certain meſſuages, to John Connock, mayor of the 1555.

[o] The Earldom of Cornwall, though not a county palatine, had many royalties belonging to it. Hale *de Jure Maris*, p. 1. ch. 7.

borough

borough of Liſkeard, and the burgeſſes of the ſaid borough, and their ſucceſſors.

1566. 5 May, 8 Eliz. A deed poll, by the mayor and 8 others (named) "aldermen of the ſame borough," and 9 others, (named) "being the 18 men elected and conſtituted governors of the meſſuages, lands, and tenements, and other the goods and chattels of the pariſh church of Liſkeard aforeſaid, according to ancient cuſtom within the pariſh aforeſaid," &c. "In witneſs whereof we the aforeſaid John Connock, &c. have diſtinctly put our ſeals; and becauſe the ſeals are not for the moſt part known by all perſons to be ours, we have cauſed the common ſeal of the borough of L. aforeſaid to be openly and neatly put," &c.

1566. 5 May, 8 Eliz. Two other deeds poll ſimilar to the preceding.

1568. 10 Eliz. The Queen's commiſſion to Clarencieux King of Arms to viſit the eaſt, weſt, and ſouth parts of England to ſurvey arms.

1573. 15 Eliz. Office copy of the original viſitation of the borough of Liſkeard. The arms.

A fleur de lys, ſurmounted by martletts dexter and ſiniſter, with the inſcription, "*Sigillum communæ burgi de Leſkertt.*" See *ante*, Vol. I. p. 115.

1573. 26 May, 15 Eliz. Indenture between the mayor and burgeſſes on one part, &c. under their common ſeal.

1574. 4 Nov. 16 Eliz. A ſimilar deed.

1585. 19 Apr. 28 Eliz. Indenture of leaſe of lands under the common ſeal: the rent is reſerved to the mayor and burgeſſes, and their ſucceſſors.

1586. 24 Oct. 29 Eliz. Indenture of leaſe between the mayor and others (named)[p] the chief burgeſſes of the ſaid borough; witneſſing, that the ſaid mayor and chief burgeſſes, by the common conſent of the inferior burgeſſes of the ſaid borough, have demiſed, &c.

Same day. Indenture of a like import.

Judgment. M. 11 W. 3. B. R. Office copy of a judgment in the caſe

[p] By a reference to the conſtitution book of the 9th Apr. 30 Eliz. (1587,) all theſe appear to have been capital burgeſſes.

of

of Pyper *v.* Denys. *Vid.* Holt's Reports, 170. "Upon a *Quo warranto* againſt the town of Liſkeard in K. Charles the 2d's time, they ſurrendered their charter, which was not enrolled till K. James the 2d, who in conſideration of the ſurrender, granted a new charter to them. Pyper *v.* Dennis.

"*Per cur*: the ſecond charter, being in conſideration of a void ſurrender, was alſo void." See the ſame caſe reported, Caſ. B. R. (or, 12 Modern Reports,) 253. And ſee the caſe of Butler *v.* Palmer, Ibid. 247. 1 Salk. 191. S. C.

10 & 11 W. 3. Buller *v.* Roberts. B. R. Roll 630. This was an action brought by the plaintiff againſt the defendant who was at that time mayor of the borough of Liſkeard, for making a falſe return. The record in this action, after ſtating the ſubſtance of the act of parliament upon which it was brought and the writ directed to the ſheriff for returning members, &c. ſtates, that the ſaid ſheriff by virtue of the ſaid writ his certain precept in writing, &c. to the mayor or chief officer and burgeſſes of the borough of Liſkeard directed, and thereby commanded them that they ſhould cauſe to be choſen two burgeſſes, &c. to be at the Parliament &c. on the 24 Aug. then next enſuing: that the plaintiff was *by the burgeſſes of the ſaid borough having the right of election* then and there preſent in due manner elected one of the two burgeſſes of the ſame borough to be at the ſaid Parliament: yet defendant well knowing the premiſes, and the ſtatute aforeſaid, not the leaſt regarding, &c. but contriving the ſaid plaintiff to aggrieve, and him of his place in the ſaid Parliament to diſappoint, voluntarily a certain indenture between the ſheriff of the county, of the one part, and the defendant by the name of Richard Roberts gent., mayor of the borough of Liſkeard, and the burgeſſes of the ſame borough, of the other part, cauſed to be made, and that indenture with the common ſeal of the ſaid borough procured to be ſealed, by which it was falſely alleged and returned that the mayor and burgeſſes of the ſaid borough, by their unanimous conſent and like aſſent had choſen &c. Henry Darrell, Eſq. and William Bridges, Buller *v.* Roberts.

Pridges, burgeſſes of the ſaid borough to be at the Parliament &c., whereby plaintiff had ſuſtained damages to the value of 500*l.* The defendant pleaded not guilty; upon which iſſue was joined; but the judgment of the court (if any was given) is not recorded. See the entry in 12 Jour. p. 584. 13 Mar. 1698. *ante*, vol. i. p. 118.

Court rolls. 1488. From the court rolls, 3 H. 7. An inquiſition between the mayor, and burgeſſes, plaintiffs, and John Tege and William Leach, defendants.

1498. 13 H. 7. 'At this court came W. C. & J. C., and did fealty to the mayor and commonalty to become free burgeſſes of the aforeſaid borough, and each of them gives for a fine 2*s.* 6*d.*

1517. 8 H. 8. At a law court held on Thurſday next after the feaſt of the Epiphany, J. R. & J. M. made fine to be free burgeſſes, and they are ſworn and give for a fine each of them 2*s.* 6*d.*

1531. 22 H. 8. At this court came J. R. & J. H., and prayed of the mayor and commonalty licenſe to be burgeſſes within the borough aforeſaid, according to the ancient cuſtom of the borough, and they are admitted by their oath, and give &c. There were many ſimilar entries. The mayors in their accounts make themſelves debtors for theſe fines.

1531. 22 H. 8. 2. Preſentments of reliefs due to the mayor and burgeſſes; and an order that the *præpoſitus* ſhall diſtrain on the next heirs to do fealty to the mayor and commonalty. Many other ſimilar entries were ſtated to appear on the court rolls.

1603. 2 Jac. 1. The following liſts appeared in the court books. 1 Names of the free tenants: 65 names. 2. Names of the burgeſſes: 69 names. 3. Names of the reſiants: 53 names. It appeared that ſome of the names had been ſtruck out of the laſt liſt, in conſequence of the perſons having been admitted to the freedom of the borough on payment of a fine, and ſworn.

1604. Similar liſts.

1607. 4 Jac. 1. At a law court and view of frank pledge held 29 Apr. 4 Jac. 1. they preſent J. P. for that he keepeth a

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public ſhop within the liberty not being a burgeſs, &c. "At this court S. P. is admitted to be a burgeſs within the borough aforeſaid, and to have the liberties and privileges, and franchiſes of the ſame borough; and he found pledges for his fine, and is fined 13*s.* 4*d.* becauſe he was born without the borough. 3 ſimilar entries: R. C.'s fine was 5*s.* becauſe he was born within the borough.

In 1663, & 1664, there appear to have been 8 capital burgeſſes, beſides the mayor; 110 inferior burgeſſes: and *reſ. burgenſium prædict.* 3.

A part of the charter of Q. Eliz. was read, whereby it is ordered that no burgeſs or other inhabitant within the precincts of the borough, may implead other burgeſſes or inhabitants &c. out of the borough.

The following extract was read from the book of conſtitutions: 7 Apr. 1719.

Provifions for the poor.

'Whereas it hath been the conſtant cuſtom and uſage within this borough, that the mayor of the ſame after the expiration of the year of his mayoralty, at the Eaſter then following, takes on himſelf the charge of the poor within the ſaid borough for the year then enſuing, and chooſeth three other inhabitants of the ſaid borough to be his aſſiſtants therein, and are called overſeers of the poor of the ſaid borough, whereof the magiſtrate overſeer is the chief, and called the magiſtrate overſeer, and by and with the advice and conſent of the mayor of the ſaid borough for the time being, is and ought to be the principal and ſole director in all things concerning the proviſions of the poor that year, as well for their weekly pay, as for their cloathing, ſhoes, and other neceſſaries, notwithſtanding which ſeveral of the inferior overſeers have of late years taken upon themſelves, and without the order or conſent of the mayor or magiſtrate overſeers, to give orders for woollen, linen, ſhoes, cards, and other neceſſaries for the ſaid poor, whereby it hath been found they have charged the ſaid borough on paſſing their accounts much more than they could have done, if the ſaid cuſtom had been obſerved, the which breach of cuſtom is a manifeſt prejudice to the corporation; therefore to prevent the ſame miſchief for the future, we the

the mayor and capital burgeſſes of the ſaid borough, do hereby give this timely notice to the preſent overſeers of the poor of the ſaid borough, that we reſolve to maintain, ſupport, and continue the ſaid cuſtom, and that if any of the inferior overſeers do take up, beſpeak, provide, or pay any money, linen, woollen, ſhoes, cards, or other things whatſoever, for or towards the relief or maintenance of the poor of the ſaid borough, without the knowledge, direction and order of the ſaid mayor for the time being, and of the magiſtrate overſeer aforeſaid, the ſame will not be allowed on their account; and we do declare that this order ſhall from henceforward be kept and eſtabliſhed, and we do hereby direct and deſire the ſaid magiſtrate overſeer now in being, and all other magiſtrate overſeers for the future, to obſerve the ſame, and to take due care that the poor be in all things ſufficiently provided for, according to former uſage within this borough, and that upon application to him made by the inferior overſeers or either of them concerning the ſame, he take the advice and conſent of the mayor for the time being, ſo that ſuch ſpeedy and effectual orders and directions may be given therein, as the caſe ſhall require.

Returns. The returns from 6 & 7 Edw. 4, to 18 Ap. 1660, were entered as read. The returns of 16 Nov. 26 Eliz. and 26 Oct. 30 Eliz. were produced: to the former were appended the remains of a ſeal, upon which a large fleur de lys was ſtill diſcernible, and the letters I. S. K. E. A. R. D. In the latter, only the label of the ſeal remained.

The returns from 1661 to 1790 were brought from the petty bag office. In 1722 Edward Eliot and John Lonſdale were returned. This was the firſt return of any perſon of the name of Eliot.

Polls. Two papers were given in evidence; one of them purported to be the copy of an old poll, taken 2 Aug. 1698.

1698. At the head of the liſt of voters, appeared the word 'freemen.' At the bottom of the liſt were theſe words; Charles Trelawney, Eſq. and John Allen of Loſtwithell were not called by the mayor's liſt of freemen, yet they both voted.

"All

"All the reſt of the voters were called over by the mayor as freemen, who all voted, *ut ſupra.*"

On the back of the paper was the following indorſement; "A poll taken at the election of burgeſſes to ſerve in "parliament for the burgh of Liſkeard, the 2d of Auguſt, 1698.

"There being preſent who voted as freemen in all 99 perſons, each having two votes, makes votes 198; whereof

Mr. Darrell had -	68	
Mr. Buller - -	56	excepted againſt 6.
Mr. Bridges -	54	excepted againſt 5.
Mr. Bertie - -	18	
Mr. Trelawny -	1	
Mr. Pyper -	1	
	198	

"Exceptions againſt Mr. Buller's votes; 2, as no freemen.
4, as paupers.

"Exceptions againſt Mr. Bridges' votes; 2, as no freemen.
3, as paupers."

The ſecond paper appeared to be a liſt of freemen made out for the convenience of a particular candidate; together with an entry for what candidate it was expected that each freeman would vote. The date was in the year 1714. List of freemen, and their votes. 1714.

The charter granted to the borough of Launceſton, 6 R. 2., containing by *inſpeximus* the grant from Richard Earl of Cornwall. Charters of Laiſt and Helleſton [q].

The charter granted to the borough of Helleſton, 1 R. 2. See copies of theſe charters at the end of this caſe.

Extracts from the Journals of the Houſe of Commons, 17 Mar. 1723-4. 20 Jour. 297. The report from the committee of privileges and elections touching the election for the borough of Dunheved *alias* Launceſton. "The petitioner's counſel inſiſted, that this borough was firſt incorporated in the time of Philip and Mary: that the right of election was founded on their charter, which incorporated the mayor and 8 aldermen, all named to be inhabitants; Journals. Launceſton.

[q] See *ante* Vol i. p. 112. *poſt*, note (A).

and

and gave power to them, or the major part of them, to admit inhabitants to be burgeſſes or freemen; which are ſynonymous terms in the charter: that the right of election is in the mayor, aldermen, and freemen, being inhabitants at the time they were made free, and not receiving pay of the pariſh.

" The ſitting member's counſel inſiſted, that this is an ancient borough, and before their charter ſent members to parliament time out of mind: that the charter confirmed all their ancient rights and privileges, and neither did nor could alter the right of election, which was in the mayor, aldermen, and freemen ſworn before the mayor and aldermen, or the major part of them, whether ſuch freemen were inhabitants or not, at the time of admiſſion, and who do not receive alms or charity from the pariſh."

The date of the charter is then ſtated, (15 Feb. 2 & 3 P. & M.) and a ſummary of its contents: the confirmation of their ancient rights: the power granted " to the mayor and commonalty" to elect " *tales de diſcretioribus, probioribus, & magis quietis viris et inhabitantibus prædicti burgi, fore et eſſe burgenſes*, &c. with a power to remove for certain offences *aliquem burgenſium liberorum hominum ſive inhabitantium burgi*, &c.: and, the clauſe for electing burgeſſes to parliament.

" The ſitting member's counſel inſiſted, that the preſcriptive right was evident, from the whole tenor of this charter; which begun with recitals, by *inſpeximus*, of no leſs than 8 ancient charters granted by former kings, *viz.* Edw. 6. H. 8. H. 7. Edw. 4. H. 5. H. 4. R. 2. and Richard Earl of Cornwall; all which charters, and all grants, liberties, and cuſtoms, contained therein, whether by grant, cuſtom, or preſcription, are confirmed by this charter of P. & M., except the election of portreeves." They produced returns of 4 & 11 Sept. 1 Mar. 2 & 3 P. & M. 26 Eliz. 30 Eliz. and 16 Car.

" The ſitting members' counſel offered to prove, that foreign burgeſſes had joined in returns to parliament ſince the charter of P. & M., which the petitioner's counſel admitted to have been done in and ſince the reign of Jac. 2.: but

but insisted, that the foreign burgesses had no right; and that the charter of P. & M. was the first charter of incorporation of this borough, and the only charter under which the burgesses acted; and observed, that all precedent grants or charters therein recited, were only grants or charters of confirmation of privileges, and none of them charters of creation, or incorporation." Then they called witnesses to prove that non-resident freemen had usually voted, and were never denied. One witness on the other side, spoke to the out-burgesses having been objected to in 1714; but he could not tell whether they had been received or rejected by the mayor. The committee resolved, that the right of election was "in the mayor, aldermen, and freemen, being inhabitants at the time when they were made free, and not receiving pay of the parish." The House agreed in this resolution. p. 300.

24 Mar. 1734-5. 22 Jour. 429. Another report from the committee of privileges and elections touching an election for this borough. The committee resolved, "that the aldermen of the borough ought to be elected out of the legal freemen of the said borough only." The resolution abovementioned of 17 Mar. 1723, was read, as the last determination. Supplemental resolution.

11 Mar. 1775. 35 Jour. 189. The appointment of a select committee to try the matter of the petition of Philip Yorke and Francis Cust, Esqrs., and also of the petition of Richard Johns, jun. alderman, and of Matthew Wills and others, freemen of Helleston. See the report of that case, 2 Ld. Gl. 1. And see the case of Helleston, 1790. 1 Fla. 3. Helleston.

The entries in the Journals, 5 May, 1660; 28 Mar. 1681; 13 Mar. 1698, mentioned in vol. i. p. 117, 118, were also read.

The defending petitioners produced many witnesses, who spoke, from very authentic sources of information, to the known and ancient distinction between the burgesses or freemen, and the inhabitants of the borough; and to the right of election having always been considered to be in the capital burgesses, and the freemen, and not in the inhabi- Parol evidence. Right of voting.

tants: that in the year 1754, when Mr. Stanhope and Mr. Nugent were candidates, the town-clerk called over the names of the capital burgeſſes and freemen from a liſt [r]; and that each perſon who was preſent, voted, as his name was called; that none of the inhabitants voted, although they were then attending in the hall, as ſpectators, in great numbers. They proved, with reſpect to the tolls paid upon the ſale of corn and cattle at the fairs, that the freemen paid but half toll, and the inhabitants, the full toll; and that the ſame privilege was allowed to the freemen upon the ſale of their corn in the market, when they claimed it. They proved alſo, that that part of the borough, which lies within the pariſh of St. Clear, was charged to the poor's rate for that pariſh.

Tolls.

Poor's rate.

Argument for the oppoſing petitioners.

For a great part of the arguments on behalf of the oppoſing petitioners, particularly, reſpecting the meaning of the word burgeſs and the preſumption in favor of the right of the inhabitants at common law, the reader is referred to the argument for the petitioners in the former caſe [s]. Upon the preſent occaſion, they did not ſo much inſiſt that the inhabitants were entitled to the elective right as corporators: they contended however that Q. Elizabeth's charter of incorporation was originally extended to them; but that whether they were incorporated or not, the right of election belonged to them, both before the charter and afterwards. They now argued,

Right of election perſonal:

The right of election contended for by the inhabitants upon the preſent occaſion, is not a corporate right; conſequently, it is not material to conſider, whether it belongs to them in a corporate capacity, or not. It is a perſonal right, derived to them from preſcription, and which belongs to them in their character of inhabitants, before a corporation exiſted; by a higher, and antecedent title. Without diſcuſſing what, or whether any ſort of inheritance can be enjoyed by inhabitants not incorporated, it is clear, that the right of election may be ſo enjoyed; of which the city of Weſtminſter [t] is an inſtance; and many others might be added [u].

may belong to inhabitants not incorporated.

[r] See *ante*, p. 299.

[s] Vol. i. p. 125, &c.

[t] See 2 Ld. Gl. 299.

[u] See Ayleſbury, *ante* p. 257.

The early charters granted to this borough, are charters of immunity and privilege; not of incorporation. At the time when they were granted, the inhabitants of towns and boroughs, where trade firſt began to flouriſh, and the rudiments of liberty firſt appeared, were juſt emerging from that ſtate of vaſſalage, in which the lower orders of ſociety were then held under their ſuperiors. Their former ſtate of ſervitude, indeed, is indicated by the language of the firſt charter, by which it was granted to the burgeſſes, to be free. In the charters immediately ſucceeding, there are many proofs of the munificence of the royal perſons into whoſe hands this borough came; but no diſtinct marks of a corporation. There is no appointment of a ſelect, or governing body; no form of government; no mode of admiſſion; no qualification of members; no proviſion for the continuance of a corporate body. Though there may be ſome *indicia* of a corporation before 29 Eliz., it was not till that time that the borough was really incorporated. A common ſeal is not a true criterion of a corporation[v]; and in this caſe it appears that the ſame common ſeal was made uſe of by the governors of the church lands. It is ſaid, that the very grant of lands, &c. to a flux body, amounts in law, to an incorporation of that body; ſince they cannot legally hold the lands, unleſs they are incorporated. This argument however will be found to be contradicted by facts; and, as applied to this caſe, it is founded upon an unwarrantable application of the modern law of corporations, to ancient times. It was not unuſual, heretofore, for aggregate bodies of men, not incorporated, to act in a collective capacity. Madox ſays, "Many of the king's towns which were not corporate, as well as others which were corporate, were charged to pay the king yearly a ferm for their town. That is to ſay, towns not corporated might and did hold their town at ferm, in like manner as the corporated towns were (by the king's favor) wont to hold[w]." Again, "In like manner the towns corporate and not corporate were liable, without any diſcernible difference, to pay their reſpective

Early charters, not of incorporation.

In ancient times, bodies not corporate might hold lands.

[v] 2 Lud. 257

[w] *Firma burgi*, cap. 3. ſect. 1.

aids, talliages, or other duties [x]." He alſo gives many inſtances of towns not incorporated, and of other aggregate bodies and communities of men not incorporated, being charged and ſued in the ſame manner as corporations [y]. It therefore does not follow, that an ancient grant of lands, or of privileges, to a body aggregate, operated as an incorporation of that body, either wholly, or partially, for the purpoſe of rendering it capable of the enjoyment of that particular grant. Lord Coke makes the ſame exception with reſpect to the ancient practice. "The pariſhioners, or inhabitants, or *probi homines* of Dale, or churchwardens, are not capable to purchaſe lands, but goods they are, unleſs it were in ancient time, when ſuch grants were allowed [z]."

Grants to the inhabitants,

The next queſtion therefore is, upon what deſcription of perſons were the privileges contained in the ancient charters, conferred? Namely, upon the burgeſſes. As it is clear, that in thoſe times, there was no ſelect body that could anſwer to that name, it muſt refer to the inhabitants at large; or rather to ſuch of them, as were then talliated,

paying ſcot and lot.

and who afterwards were aſſeſſed to the payment of ſcot and lot. It appears, that ſome of theſe privileges are ſtill enjoyed by the inhabitants at large: the profits of the land are ſtill applied to the maintenance of the poor, which is a burden to be borne by the inhabitants. When therefore, the firſt writ of election of which we have any tradition, was executed in this borough, in the time of Edward the firſt, by whom, except by the inhabitants at large, could the election have been made? For, it is clear, that the ſelect body, who now claim it, did not exiſt till many years afterwards; and that no ſelect body, created afterwards, could legally acquire the right. Queen Elizabeth, by her charter,

[x] Ibid. cap. 4. ſect. 1. and ſee cap. 11. ſ. 3.

[y] Cap. 5. Sect. 1—15. Sect. 39, he mentions the inquiſition taken 22 R. 2. before Martin de Ferrers, the King's commiſſioner at Leſkeret, in the county of Cornwall, *ante*, Vol. i. p. 116. Laſtly he mentions, ſ. 41. "the proſecutions or actions brought againſt the men of a hundred, by common law, or upon the ſtatute of Winchester, for not raiſing of hue and cry, and alſo the fines, iſſues, and amerciaments, uſually ſet upon inhabitants of a town for treſpaſs, and ſuch other like caſes." p. 11. he ſtates the fee-ferm of Liſkeard, to have been aſſigned in dower to the widow of the Black Prince.

[z] Co. Litt. 3, a.

could

could neither directly, nor indirectly, alter it; nor is it, in fact, mentioned in that charter, which, however, profeſſes to grant all corporate rights; from whence it follows, that it muſt have been at that time conſidered not to be a corporate right, but to be already in the hands of perſons not incorporated, from whom it could not be taken. And it is remarkable that in the charter of Helleſton, granted about the ſame time, (27 Eliz.) the right of election is expreſsly given, as a corporate right, to the corporate body [a]. This ſilence in the charter is conſiſtent with the right of the inhabitants, and inconſiſtent with the right of the ſelect body, who, being created by the charter, could only have derived from it, the privilege of electing members to parliament. The immediate object of Queen Elizabeth's charter is the order and government of the borough: with this view, certain corporate officers are appointed, to whom are entruſted judicial powers; and it is remarkable that both the mayor and the common council of nine, are directed to be choſen by the burgeſſes at large; but no proviſion whatever is made for chooſing the members of the third body, namely, the burgeſſes inhabitants, neither is there any inchoate right exiſting by charter or preſcription, by which a title to be admitted into that body can accrue; nor any limitation to the number of that body. Theſe circumſtances ſtrengthen the opinion that this third integral part could conſiſt of none other than the inhabitants of the borough; for there is no other means of accounting for the ſilence of the charter upon theſe points. But it appears from the evidence in the preſent caſe, that the ſelect number have taken upon themſelves to elect the members of this body; and that, without any regard to the place of their reſidence. This uſurpation cannot be defended upon any ground; for they could not legally acquire ſuch a power by a bye-law ſo inconſiſtent with the terms of their charter. In the caſe of the King againſt Head and others, freemen of Helleſton [b], it was determined, that the ſelect body could

Charter of Elizabeth.

Caſes of illegal bye-

[a] But Helleſton is alſo a parliamentary borough by preſcription, and ſent members 26 Edw. 1. 4 Prynne, 995. according to Willis, 23 Edw. 1. See Not. Parl. Vol. 2. p. 70. See 2 Ld. Gl. 1. 1 Fra. 1.

[b] 4 Burr. 2515, 2520.

laws, in reſtraint of the right of election.

not make a bye-law confining the election of freemen to themſelves; "the common-council" (ſaid Lord Mansfield) "could not, by a bye-law, take away from the body at large the right of election which the charter had veſted in the whole body." So, in the caſe of the King againſt Spencer, a common-council-man of Maidſtone [c], the court ſaid, "You cannot change the right of the electors from one body to a different body, or intermix other perſons with thoſe who have the right in them." The other ſide therefore ſhould ſhew by what power given them in the charter, the common-council are authoriſed to elect the burgeſſes. If the principles ſtated above are adhered to in caſes where the intereſts of individuals are affected, much more ſhould they prevail, where the public is concerned, whoſe rights, (eſpecially thoſe of a political nature) are not to be barred by adverſe uſage. And if the charter could, neither directly nor indirectly, alter the right of election, much leſs could a particular part of the corporation alter it, by a bye-law inconſiſtent with the charter, and leaſt of all, by an uſurpation, unwarranted even by ſuch a bye-law. But the right of election being once veſted in the inhabitants at large, not as a corporate, but as a perſonal right, it is immaterial to the preſent purpoſe to inquire how they were affected by the charter, or by the legal principles by which corporations are governed and upheld; ſince, if the inhabitants are the corporation, it belongs to them not as corporators, but as inhabitants; and if they are not corporators, it belongs to them by preſcription, antecedently to, and independently of the corporation.

Q. El.'s charter granted to the inhabitants.

However, from conſidering the circumſtances of the borough when Q. Elizabeth's charter was granted, the terms of that charter, and what has taken place ſince the grant of it, it will appear, that it was addreſſed to the inhabitants, and that it did actually compriſe them.

The charter recites, that the burgeſſes and inhabitants of the borough have immemorially poſſeſſed many rights and

[c] 3 Burr. 1827, 1840. and ſee R. v. Cutbuſh, common-council-man of Maidſtone, 4 Burr. 2204. and R. v. Breton, mayor, and Jeyes, town-clerk of Northampton. And ſee 5 Co. 63.

privileges.

privileges. It is clear, that there was then no ſelect body; therefore, theſe words, 'burgeſſes and inhabitants,' muſt refer to the inhabitants at large. The inhabitants are incorporated. The charter further ordains, that the 9 common-council-men ſhall be choſen by the burgeſſes; and it appears in point of fact, that the inhabitants, at their firſt meeting to execute the charter, did chuſe nine of themſelves, into this office. Their firſt bye-law, that the nine chief inhabitants ſhall be reputed ſuperior burgeſſes, amounts to a contemporaneous expoſition of the ſtatute. Moreover, a proviſion is made for the nomination of one candidate for the mayoralty, by the grand jury. It cannot be ſaid that the grand jury was an exiſting body, or integral part of the corporation: they are choſen and ſworn for a particular and temporary purpoſe: which purpoſe being anſwered, they return into the maſs of inhabitants. By the ſame bye-law, fifteen inferior burgeſſes are named to be homagers on law days. It cannot be contended that this appointment amounted to any thing more than the ſelection of certain perſons from the general body of the inhabitants, to be ſworn for the performance of particular functions: yet it is under this pretext that the inhabitants at large have been excluded, and theſe ſelected perſons have been erected into an integral body, called ſworn freemen. The 'reſidue of the burgeſſes,' could be no others, than the inhabitants. The only diſtinction made among the inhabitants, is between thoſe who are charged to the ſubſidy, and thoſe who are not. The ſerjeant at mace is a corporate officer; and this office is ſerved by the inhabitants. The right to be impleaded in their own courts, and not to be ſummoned as jurors out of the borough, belongs to them, and an anxiety is ſhewn to keep out ſtrangers from the borough, to the prejudice of the inhabitants. It is immaterial, in this view of the caſe, whether or not any of the preſent inhabitants are in poſſeſſion of their corporate rights by a formal admiſſion: for the committee are to decide upon the abſtract queſtion of right, and not upon the title of any individuals. The queſtion is not, whether A. or B. had a right to vote at a particular election, but what deſcription of perſons have a right to vote at all elections.

Returns. The language, and corporate form of the earlier returns afford but slight evidence in a case of this kind. In most boroughs where there has been an existing corporation, the returns have been corporate returns, where yet, the elections have been made by the inhabitants at large; as in the case of Windsor, 8 Dec. 1640[d]. There it appeared, that the returns had been made by the mayor, bailiffs, and burgesses, or by the mayor, bailiffs, and commonalty, in the reigns of Edw. 4. and H. 8., yet the right was resolved to be in the inhabitants at large. Similar returns were shewn, in the case of Pontefract[e]; yet the right was ultimately fixed in the inhabitants at large[f]. This irregularity might possibly arise from the incorrect expression, or from the mistaken construction of the St. 23 H. 6. c. 14. by which it is directed that the precept shall be sent to "every mayor and bailiff, or to the bailiffs or bailiff where no mayor is;" under which clause it was understood by many, that the chief officer of the corporation should in all cases execute the return, even where the right of election was not in the corporators[g]. One return therefore, that can be shewn, which is manifestly not a corporate return, outweighs any number that can be produced, with the names of the corporate officers attached to them. The return 1 & 2 P. & M. by the whole town and borough is made in the most large and popular terms; it is sealed, not by the corporate, but by a private seal; and clearly points to an election not by a select body, but by the inhabitants at large: and whatever objection may be made to the return of the mayor himself, it does not affect the other member who was returned together with him; and therefore that irregularity does not affect the argument. Moreover the number of signatures (45) affixed to the return in 2 W & M. is inconsistent with the number of which the corporation (including only the capital burgesses, and the sworn burgesses) now consists.

[d] 1 Journ. 47.

[e] 1 Ld. Gl. 380. 1 Lud. 1. 2 Lud. 199. Glanv. 35.

[f] 27 Feb. 1793. 48 Jour. 297.

[g] Fra. 216. and see the cases cited by Mr. Luders, 1 Vol. p. 15, & 16. and See *ante*, Vol. 1. p. 417, 427.

It is not difficult to trace the progreſs of the uſurpation by the ſelect body. It appears to have been very early contemplated. In 1663, the number of inferior burgeſſes was 111, which probably compriſed all the inhabitants of the town, who were talliated: this number was reduced, and the real inhabitants of the town were gradually and ſyſtematically defrauded of their privileges. In 1680 the reſolution was made to keep ſecrets. The non-reſident freemen appear to have been firſt introduced in the time of James the ſecond, who, when he reſtored the charter ſurrendered to Charles II, added the names of ſeveral noblemen to be burgeſſes of Liſkeard. This charter, from what is now known of its contents, ſeems to have afforded the model of the uſurpation now complained of, for it aboliſhed the neceſſity of reſidence, and altered the conſtitution of the borough in other reſpects. In 1698 the name of freemen, (borrowed alſo from the charter of James) firſt occurs: in 1723 it was reſolved not to admit any freemen without the conſent of the mayor and capital burgeſſes: and finally, they have reduced the whole body of the burgeſſes inhabitants, to a ſelect body of 15 non-reſident perſons, called ſworn freemen, of whoſe name, character, or office, no trace can be found in the charter, or elſewhere. The loſs of ſo many of the ancient muniments, is at leaſt a very ſuſpicious circumſtance; and it appears, from the parole evidence produced on the preſent occaſion, that there remains even now the veſtige of the ancient right, exiſting in reputation, and in the traditions that have deſcended from former times. Uſurpation.

The caſe of Tewkeſbury, 1797 [h], differs widely from the preſent, both as to the nature of the borough, and the foundation of the elective right. Tewkeſbury is a borough in ancient demeſne; but derived its elective franchiſe from the charter of James the Firſt; and the diſpute in 1797, turned upon the ſignification of the word *communitas*, in that charter. Tewkeſbury 1797.

[h] *Ante*, Vol. 1. p. 146.

f all other men of the ſame faculty within the city of London and ſeven miles about ;' but it was held that an individual phyſician practiſing in London, did not become *ipſo facto* a corporator. The ſubſtance of the argument on the other ſide is, that the ſelect body cannot legally have the right, becauſe they cannot ſhew their own exiſtence to be co-eval with the exerciſe of the right of election in the borough : but it belongs to the oppoſing petitioners to contradict the inference ariſing from an immemorial uſage; and, by ſhewing the creation and origin of the ſelect body, poſterior to the repreſentation of the borough in parliament, to prove, that there exiſted a time when the ſelect body could not have elected the members. It is admitted, that no lapſe of time can bar this inquiry, nor can any uſage defend the pretenſions of the ſelect body, if this defect can be ſhewn in their title. Where there is no ſuch proof, the legal title to the franchiſe is indicated by the long poſſeſſion of it. If it is inſiſted that no royal charter had been granted to this borough at the time of the firſt exerciſe of the elective franchiſe, and therefore, that no corporation could have exiſted there, at that time: it is anſwered, firſt, that it does not appear impoſſible, from any part of the evidence, but that a royal charter might have been granted, while the borough was in the hands of the Earls of Cornwall. It is clear, at leaſt, that they were in ſome reſpect the ſubjects of a royal grant; otherwiſe, they could not have acquired the right of election [n]. Secondly, that charters of incorporation were wont, in thoſe times, to be granted by ſubjects; (and it is ſaid, even now, that the king may grant to a ſubject the power of erecting corporations [o].) There are inſtances of ſuch charters being granted by the Earls and Dukes of Cornwall, and by the Biſhops of Durham [p]. In this caſe, the grants by the Earls of Cornwall are recognized and confirmed by the ſucceeding ſovereigns. And it is obſervable, that the

Uſage.

Charter.

Quære.

[n] Mr. Willis writes, that the firſt expreſs clauſe entitling any borough to ſend members to Parliament, was in the charter of Wenlock, 8 Edw. 4. Preſ. to Vol. i. p. xxxviii. And ſee *ante*, Vol. i. p. 55.

[o] 1 Bl. Comm. 474.

[p] Helleſton. Brady, 92. Truro, ib. 93. Launceſton, ib. 94. Saltaſh, ib. 97. Plympton, ib. 98.

boroughs

boroughs of Launceſton and Helleſton, to which a reference is made in the charter of the Earl of Cornwall, were corporations by preſcription; that each of thoſe boroughs have ſent members to parliament from 26 Edw. 1.; and that the right of election, in each, belongs to the corporation. But it is ſubmitted, that the enjoyment of lands from time immemorial, by the burgeſſes of Liſkeard, is a deciſive proof that they have been, from time immemorial, a corporation. They had beſides, their common ſeal[q], their ſelect body, their forms of election, admiſſion, and ſwearing in of burgeſſes, and their corporate acts, long before the charter of Elizabeth. There are no technical words neceſſary to make a corporation: when the privileges that are granted cannot be enjoyed but in a corporate capacity, the incorporation attaches, as a matter of courſe. The word *homines*, however, in an ancient grant, has been held to be excluſively applicable to freemen[r]; and the charter of Queen Elizabeth, in its recital, takes a view of the whole hiſtory of the borough, and clearly ſhews that it had been incorporated from the earlieſt date. It is therefore ſubmitted upon this part of the caſe, that there is ſufficient ground to preſume a royal charter of incorporation, if ſuch a charter is neceſſary to the exiſtence of the corporation[s]; or at leaſt, to preſume the conſent of the crown to the incorporation by a ſubject: and further, that without having recourſe to preſumption, it diſtinctly appears that a corporation exiſted before the time of Edward the firſt: and conſequently, that the firſt writ of election might have been, and in all probability was, addreſſed to, and executed by, that corporation. Badges of incorporation.

The diſtinction between the burgeſſes and the other inhabitants, appears in every part of the book of conſtitutions; the entries in which are unintelligible, unleſs that diſtinction be conſtantly attended to. The admiſſion of perſons to their freedom never depended upon any inchoate right, but upon the choice of the ſelect body: but they never would have choſen an inhabitant to be a burgeſs, if

[q] *S. v.* 2 Lud. 237.

[r] 1 H. Bl. 212.

[s] See Lady Stafford *v.* Llewellyn, Skinner, 78. an act of Parliament preſumed, where nothing elſe cou'd ſupport the poſſeſſion.

he

he were ſo already; nor would it be poſſible to diſfranchiſe an inhabitant, if the mere inhabitancy made him a freeman. The obſervation made on the other ſide, that the charter preſcribes no mode of election or of admiſſion of new members, ſhews, that there was already an exiſting body, and certain known forms of admiſſion and election, which it was not meant to alter, and which therefore were paſſed over unnoticed. It is admitted that many of the conſtitutions affect the inhabitants at large: but nothing is more clear, than that the corporation of all towns or places may have the power of making regulations which bind thoſe who dwell therein, although not members of the corporation. It is ſaid, that the inhabitants virtually enjoy the lands, becauſe they are exempted from maintaining the poor, who are ſupported from the profits of thoſe lands: but it is proved, that the inhabitants of that part of the borough which lies in the pariſh of St. Clear, pay to the poor's rate for that pariſh. This fact deſtroys the theory contended for on the other ſide: for if theſe lands belonged of right to the inhabitants, the benefit ariſing therefrom would have been extended to all of them.

Corporations may bind ſtrangers by their bye-laws.

Poor's rates.

Returns.

The language of the returns ſtrongly enforces the claim of the preſent corporation. The return in the time of Edw. 4. is in the name of the mayor and burgeſſes, and they continue in the ſame form, with but few exceptions, till the preſent time. Sometimes the common ſeal is uſed; and ſometimes a private ſeal: this difference is immaterial, ſince an election is not a corporate act [t]. The return 4 & 5 P. & M. is ſaid to be made by the whole borough, omitting the mayor, for the purpoſe, probably, of avoiding the appearance of the mayor making a return of himſelf. But the principal obſervation ariſing from the whole of the returns is, that there is not one inſtance from which the inhabitants can be unequivocally proved to have exerciſed the right: neither have their pretenſions been ever aſſerted, although there have not been wanting conteſts in the borough, where doubtleſs, their claims would have been preferred, had any ſuch been ſuppoſed to exiſt. With reſpect to the

[t] Vol. i. p. 356, 358.

queſtion,

queſtion, who may claim to be the corporators at Liſkeard? It might eaſily be ſhewn, from every part of the evidence in this caſe, and from the whole conſtitution of the borough, that there never has been any inchoate right to the freedom of the borough; and that ſtill leſs has it ever been conſidered that inhabitancy in the borough gave that right: but it is ſubmitted, that the queſtion is to be determined by another tribunal, and not by this. If the inhabitants are entitled to be members of the corporation by virtue of the charter of Elizabeth, the circumſtance of no inhabitant having yet preferred his claim, will not be a bar to the claim of the preſent inhabitants, in the courts of common law. Thoſe courts only, have juriſdiction to try who are the legal corporators: whether they have conformed to their charter: whether they are liable to be removed by *quo warranto*; or whether they may be compelled to admit into their number perſons of a particular deſcription. This committee is to decide whether the right of election be in the corporation, or not: they are not called upon to fix the right of admiſſion into the corporation[v]. In caſes of corporate queſtions the Houſe of Commons expects that application ſhall have been made to the courts of common law, and that the proper meaſures ſhall have been duly purſued, in order to deveſt aſſumed rights, or to enforce rejected claims[w]. Where that has not been done, the Houſe affords no relief; where it has been done, the deciſions of courts of juſtice are received as concluſive authorities upon the queſtion. But theſe petitioners cannot expect to be permitted, by their own laches, to expoſe the committee to the riſk of deciding that the inhabitants are corporators for this purpoſe, when the court of King's Bench may hereafter decide, that they are corporators to no other purpoſes: and it is a dangerous doctrine to maintain, that it is the duty of the committee, upon theſe occaſions, to overlook all technical diſtinctions, and to conſider men as corporators, with reſpect to the right of election, who neither in the common acceptation of the word, nor in the legal ſenſe of it, are at all entitled

Q. who are corporators to be determined elſewhere.

[v] See *ante* Vol. i. 75.

[w] See *ante* Vol. i. p. 479. Vol. ii. p. 229.

to be ſo conſidered. The plain rule is, that if a man claims to vote as a freeman, he muſt ſhew himſelf to be a freeman. If he has the franchiſe, he has every thing which belongs to it: if he has it not, neither has he any private or public right which flows from it.

Deciſion and report.

On the 11th of May 1804, the chairman reported, 'that the parties having been required to deliver in to the clerk of the committee ſtatements in writing of the right of election for which they reſpectively contended;

'In conſequence thereof, the counſel for the petitioners Samuel Mitchell, Joſiah Abraham, William Walliſh, and others; and alſo, for the petitioner Joſeph Childs, delivered in a ſtatement as follows: "That the right of election, for the borough of Liſkeard, &c. is in the inhabitants of the borough of L. paying, or liable to pay, ſcot and lot:

'That the counſel for the petitioners, the Hon. W. Eliot, John Carthew, John Eliot, Richard Taunton, M. D. and others, delivered in a ſtatement as follows:

"That the right of election for the borough of Liſkeard, &c. is in the mayor and burgeſſes of the ſaid borough:

'That upon the ſtatement delivered in by the counſel for the firſt-mentioned petitioners, the ſaid committee have determined,

'That the right of election, as ſet forth in the ſaid ſtatement, is not the right of election for the borough of Liſkeard, in the county of Cornwall:

'And alſo, that the ſaid committee have determined, That the right of election, for the ſaid borough of Liſkeard, is not in the inhabitants, houſeholders, reſiant [x]:

'That upon the ſtatement delivered in by the counſel for the laſt-mentioned petitioners, the ſaid committee have determined,

'That the right of election, as ſet forth in the ſaid ſtatement, is the right of election for the ſaid borough of Liſkeard.'

[x] N. B. The committee negative a right not contended for by any of the parties.

Theſe

Theſe determinations were ordered to be entered in the Journals.

Incidental points.

A queſtion aroſe very early in the trial, whether the counſel for Mr. Childs ſhould be heard ſeparately from the counſel for Mr. Mitchell and others. The counſel for the defending petitioners objected, that Mr. Mitchell and Mr. Childs were virtually the ſame party, ſince they contended for the ſame right of election. In anſwer, the caſe of Camelford 1796 was cited, where there were two petitions, in which the ſame right of election was contended for, and the petitioners were heard ſeparately; and the laſt caſe of Liſkeard, where Mr. Mackintoſh was heard for the petitioning electors, although their petition was in the ſame terms with that of the petitioning candidates: and it was ſaid, that it might open a door to colluſive petitions, if it was held, that when one ſet of petitioners had been heard, others, who petitioned upon the ſame ground, ſhould not be allowed to aſſert their right. In reply it was ſaid, that the rule of the Houſe, that only two counſel ſhould be heard on one ſide, was invariable; and that there was no neceſſity upon this occaſion to make an exception to it: that the rule applied to thoſe caſes where the points in iſſue were the ſame, however various or numerous the parties might be, who diſputed them: that in the caſes cited, the intereſts of the parties were eſſentially different; ſince the candidates only contended for a particular return; the electors, for the permanent right of election; but even in thoſe caſes, the committees heard but one reply, on the part of all the petitioners: but that here, the different oppoſing petitioners were, in all reſpects, in the ſame predicament: they ſupported the ſame right of election, and purſued exactly the ſame objects, both in regard of what they propoſed, and of what they reſiſted: laſtly that there was no juſt ground for apprehending any prejudice from a colluſive petition; it being competent to the committee, in ſuch a caſe, to relax the rule, and to hear the other petitioners.

Petitioners not to be heard ſeparately, where the matter of the petitions is the ſame. Camelford, 1796.

The committee determined, that Mr. Pell ſhould not be heard.

Hearſay of an intereſted perſon, inadmiſſible.

A witneſs was called on the part of the oppoſing petitioners, to prove what he had heard ſaid by one Lampen (who had died ſome years ago at a great age,) reſpecting the right of election. Lampen had been an inhabitant of the borough, but not a freeman. This evidence was objected to, 1. becauſe there had been no foundation laid for ſuch evidence: it was ſaid, that no evidence could be received of any right, by reputation, until ſome fact were firſt ſhewn. of the exerciſe of that right: as for inſtance, that the cuſtomary mode of the deſcent of land in a particular manor could not be ſhewn, till it had been proved that ſome perſon had at one time held, or taken an eſtate in the manor by ſuch deſcent[y]: 2. that the evidence propoſed, was the declaration of a perſon directly intereſted; and that he would have been an inadmiſſible witneſs, if alive: that a rule had been adopted by committees, to ſuffer a voter to be called who united in himſelf both the rights which were the ſubjects of diſpute, becauſe then the only queſtion which affected him, was, whether he ſhould communicate the right with more, or with fewer perſons, which was not held ſufficient to diſqualify a witneſs upon the ground of intereſt; but that they never received one who had no other claim, except that which would accrue to him by his own teſtimony: and the deciſion in the late caſe of Weymouth was cited, as an authority[z].

It was anſwered, 1. that the very uſe of the word 'inhabitants' in the charter and in the conſtitutions, laid the foundation for admitting this evidence: 2. that the declaration was admiſſible, inaſmuch as it was made at a time when the right of election was not in diſpute, and when conſequently he who made it, could have no inducement to ſpeak falſely; and it was ſaid that declarations of intereſted perſons, namely pariſhioners, reſpecting the boundaries of pariſhes, had been received by Lord Manſfield in ſimilar circumſtances[a].

The

[y] See *ante*, p. 225.

[z] *Ante*, p. 227. and ſee the caſes referred to there.

[a] On the trial of a preſentment of a road in the pariſh of Hammerſmith, Lord Mansfield admitted in evidence the declarations of an aged perſon, an inhabitant of H. (ſince deceaſed) as to

The committee determined that the evidence ſhould not be received.

A witneſs having ſtated that her father, who had been mayor of the borough, had died 43 years ago, and that ſhe remembered him ſitting with ſome of his friends at table, and drinking "the health of Mr. Richard Eliot, of Port Eliot, and ſcot and lot," was aſked the following queſtion; "Did you hear your father, and thoſe who were with him, ſtate, upon what right Mr. Richard Eliot came in?" (Mr. Eliot had been choſen Member of Parliament for Liſkeard, A. D.) This queſtion was objected to, as not being matter of reputation as to a general right, but evidence of a particular fact, which could not be proved by reputation; as in a queſtion reſpecting a right of way, in which general reputation is good evidence, but the fact of a particular perſon having uſed the way, cannot be proved by hearſay. It was anſwered that the queſtion amounted to no more than an enquiry who voted at former elections. The committee determined, that the queſtion ſhould not be put.

Hearſay of a particular fact, inadmiſſible.

to the boundaries of the pariſh; because they had been made when there was no queſtion, or diſpute. R. v. Inh. of Hammerſmith, 1776. Peake's Law of Evidence, Ed. 1804. p. xxxiii.

NOTE (A), from p. 290.

Tertia pars patentium de anno regni regis Ricardi Secundi, primo. M. 25. 1377.

De confirmatione pro burgenſibus de Helleſton. } Rex omnibus ad quos, &c. ſalutem Inſpeximus cartam confirmationis domini Edwardi nuper regis Angliæ avi noſtri in hæc verba Edw. 3. Edouardus Dei gratia rex Angliæ dominus Hiberniæ et dux Aquitaniæ archiepiſcopis epiſcopis abbatibus prioribus comitibus baronibus juſticiariis vicecomitibus præpoſitis miniſtris et omnibus ballivis et fidelibus ſuis ſalutem Inſpeximus cartam celebris memoriæ domini Johannis quondam regis Angliæ progenitoris noſtri in hæc verba Johannes Dei gratia rex Angliæ dominus Hiberniæ Joh.

dux Normanniæ et Aquitaniæ comes Andegaviæ archiepiſcopis epiſcopis abbatibus comitibus baronibus juſticiariis vicecomitibus et omnibus ballivis et fidelibus ſuis ſalutem Sciatis nos conceſſiſſe et præſenti carta noſtra confirmaſſe quod burgus noſter de Helleſton ſit liber burgus et quod burgenſes noſtri de eadem villa habeant gildam mercatoriam et quietanciam per totam terram noſtram de theolonio pontagio paſſagio ſtallagio & ſollagio ſalvis in omnibus libertatibus civitatis London Concedimus etiam iis quod non placitent niſi infra burgum ſuum de rebus vel tenuris pertinentibus ad villam ſuam præterquam de placitis ad coronam noſtram pertinentibus et placitis de terris forinſecis Volumus etiam quod habeant omnes alias libertates et liberas conſuetudines quas habuerunt burgenſes noſtri de caſtello de Lanſtaveton tempore regis Henrici patris noſtri ita quod nullus burgenſium prædictorum niſi reſidens fuerit in prædicta villa de Helleſton has habebit libertates hiis teſtibus, &c. Data per manum Will. archidiaconi apud Graneburgum xv die Aprilis anno regni noſtri ſecundo Inſpeximus etiam
Ric. R. R. cartam domini Ricardi quondam regis Romanorum ſemper auguſti in hæc verba Ricardus Dei gratia Romanorum rex ſemper auguſtus omnibus ad quos præſens ſcriptum pervenerit ſalutem Sciatis nos conceſſiſſe et præſenti carta noſtra confirmaſſe pro nobis et heredibus noſtris burgenſibus noſtris de Heuleſton quod burgus noſter de Heuleſton liber burgus ſit et quod burgenſes noſtri de eadem villa habeant gildam mercatoriam et quietanciam per totum comitatum noſtrum Cornubiæ de theolonio pontagio paſſagio laſtagio ſollagio et ſtallagio Conceſſimus etiam eis pro nobis et heredibus noſtris quod non placitent niſi infra burgum ſuum de rebus vel tenuris pertinentibus ad villam ſuam præterquam de placitis ad coronam domini regis pertinentibus et placitis de terris forinſecis Conceſſimus etiam eis pro nobis et heredibus noſtris villam ſuam cum pertinentiis et cum molendinis extra villam et cum aqua de Choloz fluente ad eadem molendina et cum omnibus aiſiamentis ejuſdem aquæ ſine aliquorum nocumento et quod poſſint erigere alia molendina ſuper eandem aquam ſi viderint eis expedire ſine alicujus nocumento ut prædictum eſt et cum triginta tribus acris terræ aſſiſis in eadem villa de villenagio noſtro per Odonem filium Frawin quondam firmarium de Heuleſton. Habendum et tenendum ad feodi firmam de nobis et heredibus noſtris eis et heredibus ſuis reddendo inde annuatim nobis et heredibus noſtris per manus ſuas duodecim libras argenti ad duos anni terminos videlicet ad Paſcham ſex libras et ad feſtum ſancti Michaelis ſex libras Conceſſimus etiam eis pratum noſtrum ſubtus villam de

Helleſton Habendum et tenendum eis et heredibus ſuis de nobis et heredibus noſtris pro annuis viginti et ſex ſolidis et octo denariis ad duos anni terminos nobis et heredibus noſtris reddendis videlicet ad Paſcham treſdecim ſolidis et quatuor denariis et ad feſtum ſancti Michaelis tredecim ſolidis et quatuor denariis Quare volumus et firmiter præcipimus quod prædicti burgenſes et eorum heredes habeant et teneant prædictam villam cum pertinentiis ſuis ad feodi firmam bene et in pace libere quiete et integre cum prædictis molendinis et omnibus libertatibus et liberis conſuetudinibus ſuis uſitatis et conſuetis ad liberum burgum ſuum et ad prædicta molendina pertinentibus ſicut prædictum eſt Conceſſimus etiam eis pro nobis et heredibus noſtris quod nullus vicecomes aut alius ballivus noſter in aliquo ſe intromittat de aliquo placito vel querela vel occaſione vel aliqua re alia ad prædictum burgum pertinente ſalvis placitis coronæ quæ tamen attachiari debent per eoſdem burgenſes uſque ad adventum juſticiariorum Et quod licet eis fine forinſeco ballivo diſtringere omnes burgenſes ſuos ubicumque ſint ſive in villa ſive extra villam pro debito noſtro vel heredum noſtrorum Quod ut ratum perſeveret et inconcuſſum præſenti ſcripto et ſigilli noſtri impreſſione illud confirmavimus hiis teſtibus, &c. Data Lanceneton ſexto die Januarii indictione tertia regni noſtri tertio Nos autem conceſſiones et confirmationes prædictas ratas habentes et gratas eas pro nobis et heredibus noſtris quantum in nobis eſt dilectis nobis nunc burgenſibus burgi prædicti et eorum hæredibus et ſucceſſoribus in perpetuum concedimus et confirmamus ſicut cartæ prædictæ rationabiliter teſtantur et prout iidem burgenſes ac eorum anteceſſores villam molendina terras et tenementa prædicta hactenus rationabiliter tenuerunt et libertatibus et quietanciis prædictis rationabiliter uſi ſunt et gavifi Hiis teſtibus, &c. Data per manum noſtram apud Bothevill ſexto die Decembris anno regni noſtri decimo. Nos autem conceſſiones et confirmationes prædictas ratas habentes et gratas eas pro nobis et hæredibus noſtris quantum in nobis eſt acceptamus approbamus ratificamus et dilectis nobis nunc burgenſibus burgi prædicti et eorum heredibus et ſucceſſoribus in perpetuum concedimus et confirmamus ſicut cartæ prædictæ rationabiliter teſtantur et prout iidem burgenſes ac eorum anteceſſores villam molendina terras et tenementa prædicta hactenus rationabiliter tenuerunt et libertatibus et quetanciis prædictis rationabiliter uſi ſunt et gavifi. In cujus, &c. Teſte rege apud Weſtmonaſterium duodecimo die Februarii.

Edw. 3.

Joh.

Per Finem quadraginta Solidorum.

1383. Tertia pars patentium de anno regni regis Ricardi Secundi ſexto. M. 16.

De confirmatione. } Rex omnibus ad quos, &c. ſalutem Inſpeximus literas patentes Ricardi quondam comitis Pictaviæ et Cornubiæ in hæc verba Ricardus comes Pictaviæ & Cornubiæ omnibus hominibus ballivis & fidelibus ſuis ſalutem Sciatis quod nos conceſſimus & dedimus & hac præſenti carta noſtra confirmavimus quod burgum noſtrum de Duneheved liberum ſit et burgenſes noſtri de eodem burgo et omnes homines ad libertates dicti burgi pertinentes ubicumque fuerint et quod quieti ſint per totam terram noſtram de pontagio de aſtalagio de ſuillagio et omnibus aliis conſuetudinibus Conceſſimus etiam ipſis et heredibus ſuis pro nobis & heredibus noſtris electionem ſuam de præpoſitis ſuis et reſpondere de firma ipſius burgi ad Paſcham et in feſto ſancti Michaelis annuatim nobis vel ballivis noſtris ſcilicet de centum ſolidis et prioratui ſancti Stephani de Lanſt. de ſexaginta et quinque ſolidis et decem denariis et leproſis ſancti Leonardi de Lanſt. de centum ſolidis de eleemoſyna noſtra Ita tamen quod ſi præpoſiti per eos electi in aliquo evidenter deliquerint vel preſumpſerint hoc ipſum ſecundum delictum et preſumptionem illam emendabunt Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris quod non placitent niſi infra burgum ſuum prænominatum de placitis vel rebus quibuſcumque pertinentibus ad burgum ſuum niſi de placitis ad coronam domini regis pertinentibus Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris habere octo comitatus per annum in burgo ſuo prænominato incipiendo a proximo comitatu poſt clauſum Paſchæ uſque ad finem octo comitatuum proximorum ſequentium Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris ut habeant et teneant unam placeam in eodem burgo ad quandam aulam gillatoriam exigendam tenendam de nobis et heredibus noſtris ubi decentius et honorabilius providerint per unam libram piperis annuatim reddendam in feſto ſancti Michaelis pro omni ſervitio querela et exactione Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris quando aliquis ballivorum noſtrorum priſam fecerit de cereviſia in caſtellum quod non tenetur habere niſi primam bikam de uno obolo minus quam alibi vendita fuerit ſecundum quod aſſiſa facta fuerit per burgenſes Si autem pluſquam unam bikam habere vel capere voluerit mercabitur ſingula et quantum ceperit ſicut alibi potuerunt venundari Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris

quod

quod nullus vicecomes aut alius ballivus noſter trahat eos in placitum niſi juſte et rationabiliter et ſine incauſatione Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris quod nullus vicecomes aut alius ballivus noſter emat vel capiat pro voluntate ſua aliquid in prænominato burgo niſi de bona voluntate et ſpontaneo conſenſu venditoris ipſius mercaturæ Conceſſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris quod non gyllent cum comitatu de aliquo ſervitio vel tallagio et labore et quod non tallientur per nos vel heredes noſtros [niſi] ad tempus quando dominus rex omnes burgos ſuos per Angliam tallia [verit] Et ut hæc conceſſio et donatio et confirmatio noſtra rata et ſtabilis perpetuis temporibus permaneat ad perpetuam confirmationem hanc cartam noſtram prænominatis burgenſibus noſtris ſigilli noſtri impreſſione confirmavimus Hiis teſtibus, &c. Nos autem omnes & ſingulas donationem conceſſiones libertates et conſuetudines prædictas et omnia alia in dicta carta contenta rata habentes et grata ea pro nobis et heredibus noſtris quantum in nobis eſt acceptamus ratificamus et approbamus et ea omnia et ſingula dilectis burgenſibus noſtris liberi burgi noſtri prædicti et eorum heredibus & ſucceſſoribus burgenſibus ejuſdem burgi pro nobis & heredibus noſtris quantum in nobis eſt concedimus et confirmamus ſicut carta prædicta rationalibiter teſtatur et prout ipſi et eorum anteceſſores et prædeceſſores burgenſes ejuſdem burgi libertatibus quietanciis & conſuetudinibus prædictis rationabiliter uſi ſunt et gaviſi. In cujus, &c. Teſte rege apud Weſtmonaſterium ſecundo die Maii.

Quære.

Pro quinque Marcis ſolutis in Hanaperio.

CASE L.

THE COUNTY OF STIRLING.

IN this caſe, the petitioner, Sir Robert Abercromby, K. B. producing no evidence in ſupport of his petition [a], the ſitting member, the Hon. Charles Elphinſtone Fleming, was reported to be duly elected, 3 May, 1804.

[a] Preſented, 30 Nov. 1802, renewed 28 Nov. 1803.

CASE LI.

THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 14th of May 1804, and conſiſted of the following Members:

Rt. Hon. Geo. Roſe, *Chairman.*	Henry Holland, Eſq.
Cha. Chaplin, Eſq.	William Odell, Eſq.
Viſc. Dunlo.	Robert Holt Leigh, Eſq.
Peter Patten, Eſq.	Richard Elliſon, Eſq.
John Scudamore, Eſq.	William Burroughs, Eſq. Nominee
Edmund Baſtard, Eſq.	for Mr. Huſkiſſon.
Henry Howard, Eſq.	Hon. Charles Hope, appointed by the
Manaſeh Lopez, Eſq.	firſt 13 [a].
Henry Bankes, Eſq.	

Petitioner: William Huſkiſſon, Eſq.

Counſel for the petitioner; Mr. Plumer; Mr. Serjt. Lens; in the abſence of either, Mr. Hobhouſe.

Counſel for the Under-ſheriff: Mr. Serjt. Praed; Mr. Pell.

Mr. Huſkiſſon's petition.

THE petition of Mr. Huſkiſſon [b] ſtated the deciſion of the committee 9 Mar. 1803, upon the right of election; that the mayor is the legal returning officer of the borough: that the under ſheriff, 4 Mar. 1804, duly ſent his precept for the election of a burgeſs to the mayor, who thereupon duly held the election, and returned the petitioner, by an indenture dated the 9 Mar. and annexed to the precept: but that notwithſtanding, the ſheriff, contrary to his duty, and wilfully and corruptly, to deprive the petitioner of repreſenting the ſaid borough, had annexed in his return to the writ a ſecond indenture of return of Mr. T. Sheridan. The petition was ordered to lie upon the table; and it was ordered that the clerk of the crown ſhould attend the Houſe on the morrow, with the

[a] There being no party before the Houſe oppoſing the petition; See ſt. 28 G. 3. c. 52. ſ. 14. ſt. 33 G. 3. c. 42. ſ. 6.

[b] Preſented, 21 Mar. 1804.

ſaid

ſaid return. On that day a petition of Mr. Henry Burgeſs was read, ſtating that a petition had been preſented complaining of a tranſaction, and ſtating groſs corruption therein, in which tranſaction the petitioner conceived his character, together with thoſe of Mr. Childs, and of the under-ſheriff, to be materially implicated: the petitioner proceeded to diſclaim all improper motives, and to juſtify his own conduct, and that of Mr. Childs; and relied on the juſtice of the Houſe, that no proceedings might be had injurious to theſe perſons, without affording them an opportunity of defending themſelves. This petition was alſo ordered to lie on the table. The deputy clerk of the crown attending, the writ, the indenture, and the two returns, were read: and the ſt. 10 G. 3. c. 16. and the petition of Mr. Huſkiſſon being again read, that petition was ordered to be taken into conſideration on Monday 9 April.

Petition in defence of the under-ſheriff.

Illegal returns.

28 Mar. Mr. Sheridan petitioned the Houſe upon the merits of the election, (ſee the next caſe,) and this petition was ordered to be taken into conſideration 23 Apr. The Speaker, 29 Mar. acquainted the Houſe, that he had received a declaration in writing from Mr. Sheridan, ſtating, that he did not intend to defend his return[c]. It was then moved, that the order of the day for taking Mr. Huſkiſſon's petition into conſideration ſhould be diſcharged: a debate aroſe upon this motion, which was adjourned to 5 April, when the order was diſcharged, and a new order made for the petition to be conſidered 3 May. The conſideration of it was afterwards deferred, till 14 May.

Mr. S. abandons his return.

The laſt determination as to the right of election was read from the entry in the Journals, 10 Mar. 1803[d]. The facts of the caſe, as they appeared from the evidence, were ſhortly theſe. The precept for the election was addreſſed by Mr. Dayman, the under-ſheriff, to Mr. Carthew, the mayor of the borough, and the receipt of it by Mr. C. was atteſted by Mr. Childs, the agent of

Right of election.

Facts of the caſe.

[c] See ſt. 28 G. 3. c. 52. ſ. 2. 4. [d] *Ante*, Vol. i. p 144. *Ante*, Vol. i. p. 527.

Mr.

Mr. Sheridan. The election (of one burgeſs, in the room Mr. Eliot,) was held 9 Mar. The candidates were Mr. Huſkiſſon and Mr. T. Sheridan: the former had the votes of 21 out of 24 corporators who voted; 3 corporators voted for Mr. S. and many of the inhabitants paying ſcot and lot tendered their votes for him, and were rejected; their names and tenders however, were entered on the poll, in order to entitle Mr. S. to the ſeat, if the committee appointed to try the petition of appeal then before the Houſe, ſhould be of opinion that the right of election was in perſons of that deſcription. After the election of Mr. H. had been declared, but before the returning officer had made out the indenture of his return, Mr. Childs, and Mr. Burgeſs another agent of Mr. S., prepared an indenture, purporting to be made between the ſheriff on one part, and the mayor and burgeſſes of the borough on the other part, and ſtating that Mr. S. had been elected by the mayor and burgeſſes, and was returned by them. It was ſealed with a private ſeal, and ſigned by the three corporators who had voted for Mr. S. and by ſeveral of the inhabitants. Mr. Childs and Mr. Burgeſs carried it to the mayor, requiring him to execute it: which he refuſed. Then they carried it to Mr. Dayman, who executed it on the part of the ſheriff. The mayor prepared a return of Mr. Huſkiſſon by indenture between the ſheriff, and "the mayor, capital, and free burgeſſes", and having annexed it to the precept, ſent them both to Mr. Dayman. They were received by Mr. D. after he had executed the firſt mentioned indenture; he however executed the laſt alſo, and annexed it together with the precept, to the writ. He ſent both the indentures, with the writ and precept, by the hands of Mr. Burgeſs, to the crown-office, where they were not received till 17 Mar. Mr. Dayman at the time of executing the ſecond indenture, obſerved, that it was moſt probable that the friends of Mr. Huſkiſſon would conteſt the firſt: and he alſo ſtated, that he had been paid handſomely for ſigning it; he ſaid however, that he wiſhed to act impartially; and it appeared, that in alluding to what he had been paid, he had re-

referred to the gratuity uſually paid to the under-ſheriff, upon the execution of an indenture of return[e]. It alſo appeared, that for the purpoſe of conducting himſelf with impartiality, Mr. D. had refuſed to ſend the precept to the mayor by the hands of the agent of either party, but had ſent it by a ſpecial meſſenger of his own.

In this caſe, no queſtion of law aroſe. The counſel for the petitioner inſiſted with great earneſtneſs on the miſconduct of the under-ſheriff, and urged the importance and neceſſity of puniſhing ſuch miſconduct with ſeverity, for the example of others. The counſel for Mr. Dayman admitted that their client was not free from blame; but they contended that he had erred from ignorance, without any intention of affording an improper aſſiſtance to one party, in prejudice of the other; and that it had not been uſual for the Houſe of Commons to interfere, in the way of puniſhment, in caſes of error, or inadvertency, where no criminal or ſiniſter attempt appeared. The reader will find, in the report made to the Houſe, what judgment the committee formed upon this ſubject: it may alſo be uſeful

Defence of Mr. D.

[e] By ſt. 23 H. 6. c. 14, the ſheriff is required, under the penalty of 100l. to make and deliver without fraud, a ſufficient precept under his ſeal to every mayor and bailiff, or to bailiffs or bailiff where no mayor is, of the cities and boroughs within his county, reciting the writ, commanding them by the ſaid precept, if it be a city, to chooſe by citizens of the ſame city, citizens; and in the ſame manner and form if it be a borough, by the burgeſſes of the ſame, to come to Parliament. And that the ſame mayor and bailiffs, or bailiffs or bailiff where no mayor is, ſhall return lawfully the precept to the ſame ſheriffs, by indentures between the ſame ſheriffs and them to be made of the ſame elections, and of the names of the ſaid citizens and burgeſſes by them ſo choſen, and thereupon every ſheriff ſhall make a good and rightful return of every ſuch writ and of every return by the mayor, and bailiffs, or bailiffs or bailiff, where no mayor is, to him made. By ſt. 7 and 8 W. 3 c. 25. ſ. 2., it is enacted, that neither the ſheriff, nor his under-ſheriff in any county or city, nor the mayor, bailiff, conſtable, port-reeve, or other officer or officers of any borough, town corporate, port, or place, to whom the execution of any writ or precept for electing members to ſerve in Parliament, doth belong or appertain, ſhall give, pay, receive, or take any fee, reward, or gratuity whatſoever, for the making out, receipt, delivery, return, or execution of any ſuch writ or precept. It clearly appeared however, that it was very uſual upon theſe occaſions to preſent the under-ſheriff with a gratuity.

to

to ſubjoin the precedents and parliamentary authorities cited on each ſide.

Caſes cited by the petitioner.

The counſel for the petitioner referred to the following authorities, to ſhew, with what degree of jealouſy the Houſe of Commons watch the proceedings of ſheriffs, returning officers, and others who have any concern with returns to Parliament: and that many caſes have been conſidered by them as the ſubjects of reprehenſion and puniſhment, where it did not appear that the offenders had acted partially, or corruptly, or from a bad deſign.

Illegal returns.

Bletchingley.

Firſt, the caſe of Bletchingley, 1623. Sir Myles Fleetwood and Mr. Hayward were duly choſen by the burgage holders on the 22d Jan. the day appointed for the election; and they were returned to the ſheriff by indenture accordingly. On the 8th Feb. the bailiff of the borough proclaimed, that on the next day, the burgage holders, and all the reſt of the inhabitants ſhould meet, to elect burgeſſes. Thirty of the inhabitants met, and choſe Sir Myles Fleetwood and Mr. Lovell, and ſealed an indenture between themſelves and the ſheriff, which indenture was delivered by Lovell himſelf into the crown-office in Chancery, without the ſheriff's conſent, who never ſealed a counterpart thereof, nor ever accepted it. The Houſe ordered, that Mr. Lovell ſhould, for ſuch his offence, be committed priſoner to the tower of London, during the pleaſure of the Houſe; and not to be enlarged till he made his ſubmiſſion, and acknowledged his fault upon his knees at the bar of the Houſe; and that he ſhould not be elected for the ſaid borough (*hâc vice*) upon the new writ which was to go forth to chooſe a new burgeſs, in the place of the ſaid Sir M. F [f].

Northampton.

Northampton, 11 Nov. 1678. Mr. Montague complained of an undue return made by the ſheriff of Sir William Temple. It appeared, that the precept from the ſheriff had been directed to the mayor and juſtices of the borough, and that the indenture annexed to the writ, whereby Sir W. T. was returned to ſerve for the ſaid borough, was not

[f] Glanv. 29. 32. 41. 1 Journ. 745.

ſigned

ſigned by the mayor, nor the ſeal of the corporation fixed thereto; and that the indenture, whereby Mr. Montague was returned, was ſigned by the mayor, and the ſeal of the corporation fixed thereto; and the ſame was annexed to the precept from the ſheriff. The Houſe after having reſolved that the return of Sir W. T. was inſufficient, and that the return of Mr. Montague ought to be annexed to the writ, ordered, that the high ſheriff ſhould be committed to the cuſtody of the ſerjeant at arms [g].

Minehead, 9 Jan. 1721-2. The return was read, which was ſigned by ſeveral of the burgeſſes of the borough: and alſo the precept of the ſheriff, directed to the burgeſſes and electors of the ſaid borough; but there was not any indorſement on the back of the ſaid precept. John Thomas and John Floyd, conſtables of the ſaid borough, were called in, and delivered in the indenture of return, which was by them tendered to the high ſheriff of the county of Somerſet, after the late election of a burgeſs. The reſolution of the Houſe 13 Jan. 1717 was read, by which it had been reſolved, that the conſtables of Minehead are the proper officers to whom the precept for electing burgeſſes to ſerve in parliament for the ſaid borough ought to be delivered, and to whom the execution of ſuch precept did belong. It was then ordered, that the indenture ſigned by John Vicary and Joſeph Sherry, and other burgeſſes of the borough, ſhould be taken off from the file; that the indenture delivered in by the conſtables ſhould be annexed to the writ of election; and that John Vicary and Joſeph Sherry, having preſumed to act as returning officer at the late election, were guilty of a high crime and miſdemeanor, and ſhould be taken into cuſtody of the ſerjeant at arms [h]. This matter was taken into further conſideration of the Houſe, 23 Jan. 1721-2 [i], and Mr. Day, the under-ſheriff, was called in and examined. He delivered in the receipt taken by him for the precept, which he delivered to John Vicary and Joſeph Sherry, as returning officers for the borough of Minehead. After reading part Minehead.

[g] 9 Journ. 537.
[h] 19 Journ. 705, this was reſolved after a diviſion; ayes 72. noes 64.
[i] 19 Journ. 725.

of

of ſtat. 7 & 8 W. 3. c. 25. it was reſolved, "that —— Day, late under-ſheriff of the county of Somerſet, having delivered the ſheriff's precept for electing a burgeſs to ſerve in parliament for the borough of Minehead to John Vicary and Joſeph Sherry, two of the burgeſſes of the ſaid borough, but not conſtables thereof, is guilty of a breach of truſt, and contempt of the authority of this Houſe." And he was ordered into the cuſtody of the ſerjeant at arms.

Kilrenny. Kilrenny, &c. 18 Jan. 1722-3. "Reſolved, that Robert Hay, of Naughton, ſheriff depute for the ſhire of Fife, having accepted, and returned to the clerk of the crown in Chancery, an indenture of return of a burgeſs to ſerve in this preſent parliament for the diſtrict of burghs of Kilrenny, Anſtruther Eaſter, Anſtruther Weſter, Pittenweem, and Crail, the ſaid indenture of return not being ſigned by the common clerk of the preſiding burgh of the ſaid diſtrict of burghs, has acted arbitrarily and illegally, in defiance of the laws of this realm, and in breach of the privilege of this Houſe[k]."

In the Journal of the ſame day, are reſolutions againſt Hugh Baillie, clerk in Inverneſs, and George Ireland, common clerk of the burgh of Kinghorn, for preſuming to act as returning officers; and an order for their commitment into the cuſtody of the ſerjeant at arms.

Inverneſs. Inverneſs, 22 Feb. 1722-3[l]. A reſolution (of a ſimilar import with that cited above in the caſe of Kilrenny) was made againſt Robert Gordon, of Haughes, for accepting an illegal return for the diſtrict of burghs of Inverneſs, Nairn, Forres, and Fortroſe: and an order for his commitment.

Coventry. Coventry, 6 Nov. 1780. "The ſheriffs made a ſpecial return, why they had not returned two citizens, certifying, that they were impeded in the execution of the writ, and that the election was prevented by riots. 15 Mar. 1781, the ſheriffs were heard in their defence; and it was reſolved, 'that it appears to this Houſe, that, at the laſt general election of citizens to ſerve in parliament for the city of Coventry, J. N. and T. B. the ſheriffs, who were the

[k] 20 Jour. 92. 113. [l] 20 Jour. 91. 146.

returning

returning officers at the ſaid election, were not prevented by riots, or otherwiſe, from making a return of members to ſerve in parliament for the ſaid city.' And it was reſolved, *nem. con.* 'that the ſaid J. N. and T. B. late ſheriffs of the ſaid city of Coventry, not having made any return of members to ſerve in parliament at the laſt general election for the ſaid city, are thereby guilty of a high violation of the law, and a groſs breach of the privileges of this Houſe.' And for this offence they were ordered to be committed to his majeſty's gaol of Newgate [m].

It was obſerved, in excuſe for Mr. Dayman's conduct, that the return of Mr. Sheridan was a more legal and proper return than that of Mr. Huſkiſſon; ſince it purſued the terms of the laſt determination, and purported to be made by the mayor and burgeſſes; whereas that of Mr. Huſkiſſon purported to be made by the mayor, capital, and free burgeſſes: and that the ſheriff would not only have been juſtified in refuſing that return, but was bound to refuſe it, by the terms of the ſtat. 7 & 8 W. 3. c. 7. ſ. 1. which forbids the return of any perſon contrary to the laſt determination of the Houſe of Commons: that the right of election was, at the time of the election, under appeal in the Houſe [n], and if the appeal had been determined in favor of the inhabitants paying ſcot and lot, Mr. Sheridan, who had a majority of them in his favor, would have been entitled to the ſeat; that conſequently, he had a right to tender the return to the ſheriff to be executed: that if the appeal had been determined in favor of the petitioners appellants, this very return would have been accepted by the Houſe of Commons, and annexed to the precept, inſtead of the return of Mr. Huſkiſſon. For this was cited the caſe of Helleſton, 2 Ld. Gl. 16. The precept was directed to, and executed by the mayor of the new corporation, and Lord Carmarthen and Mr. Owen were returned by him. Six of the old corporation proceeded to make another election by themſelves, at which Richard Johns (one of them) acted as preſiding officer, and made a return of Mr. Yorke and Mr. Cuſt.

Defence of the under-ſheriff.

Helleſton.

[m] 1 Heyw. 376, 377. 38 Journ. 8. 295.

[n] See *ſupra*, p 275.

The

The ſheriff annexed to the writ the return made by the mayor, but ſent the other up to the Crown-office, where it was rejected. The committee having decided, (upon the queſtion of the right of election) that Mr. Yorke and Mr. Cuſt were duly elected, the indenture of return, executed by Johns and his companions, was annexed to the writ.

Pontefract. In the caſe of Pontefract, Glanv. 133. the ſheriff annexed two indentures to the writ, one of a return of Sir John Jackſon, by the mayor, aldermen, and burgeſſes; another of a return of Sir Rich. Beaumond, by other aldermen, and burgeſſes: the election was determined to be void; but the ſheriff does not appear to have incurred any reprehenſion from the Houſe for his conduct[a].

Deciſion and report. The committee determined, 16 May, 1. that Mr. Huſkiſſon, only, ought to have been returned;

2. That Mr. John Dayman, under-ſheriff of the county of Cornwall, in annexing to the writ the indenture complained of in the ſaid petition of William Huſkiſſon, Eſq. acted contrary to his duty, and in violation of the privileges of parliament.

Report made. The report was made to the Houſe 16 May; and the return was ordered to be amended by taking off the file the indenture by which Mr. Sheridan had been returned. (This was done 17 May.) It was ordered alſo, that the minutes of the proceedings ſhould be laid before the Houſe, and the ſpecial report taken into conſideration, 30 May. The report was, in fact, taken into conſideration, 7 June; when the entry in the Journal 1 Apr. 1803, of the proceeding in the caſe of Great Grimſby[b], having been read, it was reſolved that the charge ſhould be heard on the Monday next, at the bar of the Houſe, and that Mr. Dayman ſhould then attend; that a copy of the ſaid charge ſhould be ſent to him, and that he ſhould be at liberty to be heard by his counſel. 11 June Mr. Dayman attended, and was heard: and having ſtated the reaſons which induced him to annex to the writ the indenture complained of in the petition of Mr. H., he intreated the Houſe to extend their indulgence to a fault

Proceedings in H. of C.

[a] See *ante*, Vol. i. 3, 17, 505. [b] *Ante*, Vol. i. p. 75.

committed

committed ſolely through an error in judgment. The Houſe reſolved, that in annexing that indenture to the writ, he had acted contrary to his duty, and in violation of the privileges of parliament; and ordered him into the cuſtody of the ſerjeant at arms. 13 July, he petitioned for his diſcharge; and on the next day he was ordered to be diſcharged upon payment of his fees: and received the following reprimand from the Speaker:

Under-ſheriff committed.

'A ſelect committee of the Houſe, appointed to try and determine the merits of the laſt return for the borough of Liſkeard, have reported, that you, being under-ſheriff of the county of Cornwall, in annexing to the writ the indenture complained of by the petition of Mr. Huſkiſſon, acted contrary to your duty, and in violation of the privileges of parliament: upon this charge you have been heard; and the Houſe, after hearing you, has reſolved, that you are guilty of the offence laid to your charge, and has ordered you into the cuſtody where you now are.

Reprimanded and diſcharged.

'The office of ſheriff is a truſt of the higheſt importance to the parliamentary conſtitution of this country: the impartial execution of its duties is indiſpenſably neceſſary to the preſervation of the rights and privileges of this Houſe; and all practices employed to falſify or delay the returns of members to ſerve in parliament, demand the ſevereſt examination.

'Your profeſſional education and general habits of life ought to have made you acquainted with the duties of the office which you undertook, or you ſhould have abſtained from it altogether; beſides which, it is but too plain, from the facts in evidence, that your attention was awakened at the time to the illegality of the act which you proceeded deliberately to commit.

'This Houſe, nevertheleſs, in conſideration of your alleged inexperience in ſuch matters, and the contrition which you now feel for your offence, and hoping, that the public notice which your caſe has attracted may operate as a ſalutary warning to others upon whom the like duties may devolve, has ordered that you be now diſcharged; and you are diſcharged accordingly, paying your fees.'

CASE LII.

THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 15th of May, 1804, and conſiſted of the following Members:

Rt. Hon. Cha. Yorke, *Chairman.*	Sir H. P. St. John Mildmay, Bart.	
Jefferys Allen, Eſq.	William Adams, Eſq.	
Michael Hicks Beach, Eſq.	John Berkeley Burland, Eſq.	
Nicholas Vanſittart, Eſq.	Arthur Howe Holdſworth, Eſq.	
Wm. Lewis Hughes, Eſq.	Geo. Johnſtone, Eſq. for the petitioners.	Nominees.
Sir Ja. Graham, Bart.	Robert Ward, Eſq. for Mr. Huſkiſſon.	
Hugh Leyceſter, Eſq.		
John Patteſon, Eſq.		
Ja. Brodie, Eſq.		

Petitioners: 1. Thomas Sheridan, Eſq. 2. Inhabitants Houſeholders: againſt the election and return of Wm. Huſkiſſon, Eſq[a].

Counſel for the Petitioners: Mr. Adam. Mr. Pell.

for Mr. Huſkiſſon: Mr. Plumer. Mr. Serjt. Lens. Mr. Hobhouſe.

Petitions.

THE petition[b] of Mr. Sheridan ſtated, that at the laſt election a majority of legal voters tendered themſelves in favor of the petitioner, the greater part of whom the mayor took upon himſelf to reject, and returned Mr. Huſkiſſon as duly elected, by which means a double return had been made, when the petitioner alone ſhould have been returned.

A petition of certain inhabitants[c] ſtated the election held 6 July 1802, the petitions preſented againſt that return, and the

[a] Mr. Huſkiſſon became the ſitting member 17 May, when the return was amended in his favor. See *ante*, p. 332.

[b] Preſented, 28 Mar. 1804.

[c] Preſented, 5 Apr. A certificate was read of the deputy clerk of the crown, ſignifying, that the return was delivered into the crown office, 17 Mar. The order of the Houſe 23 Nov.

the deciſion of the ſelect committee, both upon the merits, and the right of election; and the petition of appeal againſt the right, as reported by them: that the ſaid petition was ordered to be conſidered on the 17 Apr. then enſuing: that on the 9 Mar. an election took place of one burgeſs in the room of Mr. Eliot, (now Lord Eliot) at which Mr. H. and Mr. S. were candidates; and that the petitioners and others, claiming a right to vote at the election as inhabitants paying or liable to pay ſcot and lot, and conceiving that ſuch right could not have been defeated by the deciſion of the firſt committee, being ſo petitioned againſt, tendered their votes to the mayor for Mr. S.; and that Mr. S. ought to have been returned by the mayor: and therefore praying, "that in caſe the petition of right, now pending before the Houſe, be decided in favor of the petitioners, and thoſe claiming to vote as inhabitants of the ſaid borough of L. paying, or liable to pay ſcot and lot, the election of the ſaid W. H. may be declared null and void; and that the ſaid T. S. might be declared to have been duly elected; and that the return might be amended accordingly."

Both theſe petitions were ordered to be conſidered 23 Apr. The conſideration of them was deferred till 15 May.

The right of election was read from the report made to the Houſe from the committee of appeal, 11 May, 1804.

The petitioners declining to produce any evidence in ſupport of their petitions, Mr. Huſkiſſon's counſel applied to the committee that they might be voted frivolous and vexatious, or at leaſt vexatious.

Queſtion, whether the petition ſhould be voted frivolous and vexatious?

Mr. Adam, on behalf of the petitioners, argued, that when theſe petitions were preſented, the queſtion meant to be litigated was preciſely the ſame as was before the committee in 1803[d]: that thoſe petitions, ſo far from being frivolous or vex-

Nov. 1803 was read, requiring all perſons that will queſtion any returns, to do it within 14 days next, and ſo within 14 days after any new return ſhall be brought in. "But the Houſe not having proceeded upon buſineſs ſince Thurſday laſt, (29 Mar.) and being informed, that the ſaid petitioners would have petitioned this Houſe within 14 days next after the ſaid return had been brought in, if they had proceeded upon buſineſs ſince Thurſday laſt: ordered, that the ſaid petition be now received."

[d] *Ante*, Vol. i. p. 110.

atious, occupied the attention of the committee for many days, and not even an attempt was then made to induce the committee to vote them frivolous or vexatious; that if thoſe were not ſo, the preſent could not be: that the preſent petitions aroſe out of an accidental vacancy, which produced a new election, and a double return: that on this return there was a petition from each candidate, and the committee on Mr. Huſkiſſon's petition had not yet made their report; that the preſent petitioners did not now mean to proceed, becauſe the petition on the right of election had been decided againſt them, but that deciſion [e] was reported to the Houſe only on Friday laſt, and until that time, his clients had the greateſt confidence of ſucceſs; that the witneſſes which would have been neceſſary in this caſe for Mr. Huſkiſſon, if the petitioners had perſevered, muſt neceſſarily be the ſame as were before the committee on the right and that on Mr. Huſkiſſon's petition, and therefore no great expence could have been incurred by Mr. Sheridan and his friends not having given notice to the other party of their having abandoned their intention of proceeding in the preſent cauſe: that ſuch notices have been frequently given, ſometimes of abundant caution, and ſometimes as a cloak of compromiſe, but no committee had ever deemed them to be neceſſary. But even if the committee ſhould conſider the conduct of the petitioners to have been in any degree vexatious, the act 28 G. 3. c. 52. ſ. 18 & 19. would not warrant them in pronouncing the petitions themſelves to be ſo: that the words of the ſtatute are not the 'conduct of the parties,' but only the 'petition,' and the words of a penal law cannot be ſtrained to a ſubject not obviouſly within them; that the committee is ſworn to try the merits of the petition, and not the conduct of the parties; and that no circumſtances poſterior to the preſenting of the petition can authoriſe them to report to the Houſe that the petition is vexatious.

It was admitted by the other ſide, that at the time theſe petitions were preſented there was *probabilis cauſa litigandi*,

[e] *Ante*, p. 316.

inaſmuch

inaſmuch as the former deciſion on the right of election might have been reverſed on the appeal then pending. But it was inſiſted, that as ſoon as that appeal was decided, the only ground on which the preſent petitioners could poſſibly ſtand was withdrawn from them, and it then became their duty to give notice to Mr. Huſkiſſon that they ſhould give no evidence before the committee; yet they had withheld any ſuch intimation, and had in conſequence put him to the expence of preparing to defend his right to the ſeat, and for this grievance he could have no redreſs, unleſs the committee pronounced theſe petitions to be vexatious; and the ſtatute could never be intended to apply merely to the petition, but muſt embrace the whole conduct of the party.

The committee reſolved, 'that the chairman do acquaint the counſel for the petitioners that he is at liberty to ſpeak upon the conſtruction of ſt. 28 G. 3. c. 52. ſ. 18 & 19. as to the power of the committee to report a petition to be frivolous and vexatious in conſequence of the conduct of the petitioners ſubſequent to the preſenting of ſuch petition; and that there is no reaſon for him to reply generally. Reſolutions.

After he had been heard to that point, the committee determined, 16 May, that Mr. Huſkiſſon was duly elected, and that the petitions were not frivolous or vexatious [f].

[f] See *ante*, Vol. i. p. 469, 473.

CASE LIII.

THE COUNTY OF MIDDLESEX.

The Committee was appointed on the 19th February 1805, and consisted of the following Members:

Visc. Marsham, *Chairman.*	Dav. Clephane, Esq.	
Rob. Sharpe Ainslie, Esq.	Cha. M. Ormsby, Esq.	
Sir Wm. Middleton, Bart.	Hon. Arch. Acheson.	
Visc. Fitzharris.	Anth. Hardolph Eyre, Esq.	
John Spencer Smith, Esq.	Hon. St. A. St. John, for the petitioner.	Nominees.
Sir Rob Peele, Bart.	Fra. Gregor, Esq. for the sitting member.	
Cha. Duncombe, Esq [a].		
Ja. Hamlyn Williams, Esq.		
Cha. Mordaunt, Esq.		

Petitioners; Electors.

Sitting Member: George Bolton Mainwaring, Esq.

Counsel for the petitioners: Mr. Plumer: Mr. Adam: Mr. Warren: Mr. Clifford: Mr. Jennings.

for the sitting member: Mr. Piggott: Mr. Serjt. Lens: Mr. Courthope.

for the sheriff: Mr. Milles.

THIS election of one knight of the shire to represent the county of Middlesex, was held, in consequence of the former election having been declared void. See *ante*, p. 32.

Petition.

A petition of the several persons whose names were thereunto subscribed [b], set forth that the petitioners were freeholders of the county of Middlesex, and claimed to have a right to vote at the last election for that county; that at such election Sir F. Burdett, Baronet, and George Bolton Mainwaring, Esq. were candidates to represent the said county in parliament: that upon a shew of hands, the

See *ante*, p. 2.

sheriff, James Shaw, Esq., and Sir William Leighton, Knt.

[a] Excused, 25 Feb. on account of the death of a near relation.

[b] Presented, 25 Jan. 1805.

declared

declared the majority, on the view, to be in favor of Sir F. Burdett; but a poll being duly demanded for the ſaid election, the ſame was granted by the ſaid ſheriff and commenced 23 July, 1804: that the ſaid poll continued open on the firſt day till about 5 o'clock in the evening; that on every other day during the continuance of the ſame, the poll was kept open 7 hours; that on divers days during ſuch continuance, ſeveral perſons attended at the booths appointed according to law, to give their votes, and did accordingly declare their votes to be in favor of Sir F. B. whoſe names, places of abode, and freeholds, and in whoſe occupation their freeholds were, were duly entered on the poll, but the ſheriff refuſed to permit the ſcratches or marks to be ſet oppoſite to their names, denoting the candidates for whom they voted, until their titles to vote had been examined into, although they offered to ſubſtantiate their titles by their oaths; nor would the ſheriff allow ſuch examination to take place at the booth, but inſiſted on their attending in a box, placed at a different part of the huſtings, to undergo ſuch examination; and although ſuch perſons, in compliance with ſuch requiſition did accordingly attend at the ſaid box, yet the conſideration of many votes ſo circumſtanced, was adjourned, for want of time, till the days reſpectively ſucceeding, and thereby great delay and confuſion aroſe; that in order to prevent the ſame in future, application was made at ſundry times, by the agents, friends, and counſel of Sir F. B. to the ſheriff of the ſaid county, to keep the poll open longer than 7 hours, as by law he was bonnd to do, when upon good and ſufficient cauſe requeſted ſo to do: that the ſaid ſheriff, at the ſeveral times aforeſaid, refuſed to accede to ſuch application: that on the 14th and 15th days of the poll, the ſaid ſheriff, together with the gentleman who then and there ſat as aſſeſſor or aſſiſtant to the ſaid ſheriff, ſeverally, and at ſundry times, declared, that if at three o'clock on the ſaid 15th day, the votes of any perſons that had been before that time objected to, ſhould not have been examined, the ſaid ſheriff would proceed upon ſuch examination, and determine on the ſame, after three o'clock on the ſame, or the following day: and the petitioners

further ſtated, that at three o'clock on the 15th day of the poll, ſeveral voters were in attendance at the ſheriff's box, in obedience to orders given by the ſheriff, waiting to be examined in reſpect to the titles to their votes, which had been previouſly entered on the poll, and their votes declared, ſome for the ſaid G. B. M. but more for the ſaid Sir F. B. and the petitioners humbly ſubmitted, that if the poll had been caſt up at ſuch hour, without further examination of ſuch voters, the names of ſnch voters ought to have been reckoned, and thereby a majority of votes received on the poll, declared, as in fact it was, in favor of Sir F. B. but the petitioners further ſtated, that the poll was not caſt up, nor the numbers declared, till the following day, and in the mean time the ſheriff, in compliance with his aforeſaid promiſe, proceeded to ſatisfy himſelf reſpecting the titles of the voters ſo previouſly entered on the poll, and after ſuch examination, directed marks to be ſet oppoſite to their names, ſome in favor of the ſaid Sir F. B. and ſome for the ſaid G. B. M. according to the votes previouſly given for one or the other of the ſaid candidates: that a majority of the voters received on the poll did thereby alſo appear in favor of Sir F. B. and that the ſaid Sir F. B. ought to have been returned to ſerve in this preſent Parliament for the county aforeſaid; and that the ſaid ſheriff, well knowing the premiſes, did on the 16th day of the ſaid election, illegally, wrongfully, wilfully and falſely declare the majority to be in favor of the ſaid G. B. M., and illegally, wilfully, wrongfully, and falſely returned the ſaid G. B. M. to ſerve for the ſaid county in the preſent Parliament, although the ſaid Sir F. B. had a majority in numbers of votes received on the poll in his favor, and ought to have been returned in the ſtead and place of the ſaid G. B. M. to ſerve, &c. and therefore praying the Houſe to order the ſaid falſe return of the ſaid ſheriff to be amended, by directing the name of the ſaid G. B. M. to be eraſed therefrom, and the name of the ſaid Sir F. B. to be inſerted therein, inſtead of the name of the ſaid G. B. M. &c[c].

False return.

The

[c] 28 Jan. 1805, a petition of ſome freeholders was preſented, praying that the election and return of Mr. Mainwaring, might be declared void, upon the

The following ſtatement compriſes as many of the facts of this caſe, as will enable the reader to apprehend the points of law ariſing therefrom. The election was held on the 23d of July 1804, and laſted during the whole of the time allowed by ſt. 25 G. 3. c. 84. namely, 15 days. The poll was taken at ſeveral booths, according to the directions of ſt. 18 G. 2. c. 18. ſ. 7. The mode of proceeding with reſpect to voters objected to, was as follows: the poll-clerk having entered the name of the voter, his reſidence, the ſituation and the nature of his freehold, in the correſponding columns of the poll-book, if the voter was objected to, and the inſpectors on each ſide could not agree upon his right to vote, he was ſent to the ſheriff's booth, where his caſe was examined and decided upon by their aſſeſſor. If his vote was determined to be good, he was brought back to the poll-clerk; the freeholder's oath, and the oath againſt bribery were adminiſtered to him, and the uſual mark was made under the name of the candidate for whom he voted. On the 1ſt Auguſt the following printed form was made uſe of: it was properly filled up, and ſent round with each voter from the polling-place, to the ſheriff's booth.

Facts of the caſe.

Objected votes.

Aug. 1804.

No. Middleſex Election.

A. B. reſiding at C. D. tenders his vote for E. F. in right of a freehold conſiſting of G. H., ſituate at I. K. in the occupation of L. M. objected to by N. O., nature of objection, P. Q.

R. S. Sheriff's Clerk.

This form was made uſe of every day during the ſubſequent continuance of the poll, except the laſt. It appeared that for the ten firſt days moſt of the objections made each day had been decided upon during the courſe of the day, but on the eleventh, the objections increaſed ſo much as to

the ground of Mr. M. not having a ſufficient qualification to be elected to repreſent the county. The conſideration of this petition was deferred, till 2 May. 30 Apr. the petition being again read, and alſo the reſolutions of the ſelect committee appointed to try this queſtion of the return, the order for taking the petition into conſideration was diſcharged.

leave

leave an arrear of many votes undecided at the cloſe of that day's poll; theſe were called over in order on the next morning, and decided, if the voter attended. If they were decided to be good votes, the mark was in ſome inſtances made upon the poll-book of the day before, oppoſite to the entry of the name of the voter, made when he firſt tendered his vote: in others a new entry was made in the poll of that day, upon which the deciſion took place.

On the 13th day, Mr. Mainwaring's counſel requeſted of the aſſeſſor that recourſe might be had to the land-tax aſſeſſments, to ſee if the voters who were coming to vote were duly aſſeſſed. This requeſt was refuſed, and the reaſon aſſigned for the refuſal was, that they had not been produced or inſpected during the former part of the election, and that the introduction of ſuch an examination at the preſent time, would create great delay. On the 14th and 15th days, the numbers of perſons who tendered themſelves to vote for Sir F. Burdett greatly increaſed, and objections were made to many of them by the agents of Mr. Mainwaring: great complaints were made to the ſheriffs of the frivolity and number of theſe objections: the ſheriffs, who were alſo proved to have given directions to the poll-clerks to be particularly active and attentive to their duty on the laſt days of the poll, went perſonally to the different booths, and decided as many as they felt themſelves competent to determine upon without the aſſiſtance of their legal adviſer. The more difficult caſes were ſent round to the aſſeſſor. About 11 o'clock on the 15th day the accumulation of votes objected to and reſerved multiplying exceedingly, a ſtrong repreſentation was made to the ſheriffs on the part of Sir F. B. of the impoſſibility of deciding upon them all before three o'clock: to this repreſentation Mr. ſheriff Shaw conſtantly made anſwer that thoſe which remained undecided at that hour, ſhould be diſcuſſed and determined upon afterwards. Mr. ſheriff Shaw had before declared to the ſheriff's aſſiſtant, Mr. Cator, that in his private opinion the poll muſt finally cloſe at three, without any regard to the tendered votes. It was therefore inſiſted, that what was called his promiſe, was merely the promulgation

gation of the opinion of his counſel, by which he had reſolved to be governed; and it was remarked, that the counſel for Sir F. B. afterwards, when arguing before the aſſeſſor, upon the competency of the ſheriffs to add theſe votes, did not in any manner allude to, or inſiſt upon, Mr. Shaw's promiſe. Several of the inſpectors for Sir F. B. depoſed, that in conſequence of this aſſurance they were more indifferent to the number of objections made by their opponents. One witneſs ſwore that he had repreſented the ſame difficulty to Mr. Shaw on the 14th day, and had received the ſame anſwer; that at 8 o'clock the next morning he mentioned it again, and propoſed to argue the queſtion, whether or not it was competent to the ſheriff to diſcuſs the reſerved votes after 3 o'clock on the 15th day; but that the aſſeſſor told him that the queſtion had been conſidered, and that the ſheriffs had decided that they had the power to diſcuſs and decide upon them after that hour; and that the counſel for Mr. Mainwaring was preſent when this paſſed, and made no objection. But the aſſeſſor, in his evidence, gave a very different account of this part of the tranſaction: he ſaid, that the witneſs above-mentioned, on the morning of the 15th day, declared his intention of arguing the point; that he began his argument; that the aſſeſſor told him he was inclined to agree with him [d], and wiſhed to know if it was oppoſed on the other ſide; and that the counſel for Mr. Mainwaring ſaid, with great earneſtneſs, that it was oppoſed; that the aſſeſſor deferred the diſcuſſion till 3 o'clock. He ſaid, no application had been made to him on this ſubject on the 14th day, nor did any communication take place reſpecting it between him and the ſheriff till after 4 o'clock on that day.

[d] The following memorandum was made at the time, by the ſheriff's aſſiſtant. "At the opening of the court Mr. C. requeſted to know the courſe the ſheriffs intended to purſue with regard to the votes objected to, which ſhould not be determined by the aſſeſſor previouſly to three o'clock, and was proceeding to argue upon the conſtruction of the ſtatute, when the aſſeſſor interrupted him by ſaying, the ſubject had been conſidered, and that the ſheriffs would not caſt up the poll till all the votes objected to on either ſide, and which had been tendered previouſly to 3 o'clock, had been heard and determined."

The

The poll continued open every day from 9 to 4. If any voter was in the act of giving his vote at the time the order was given for closing the poll, that vote was taken. The books were then carried round to the sheriff's booth, and the numbers were cast up. After the close of the poll on the 14th day, the sheriffs and their assessor, with the undersheriffs and their assistant, went to Hounslow, where they dined, and consulted together upon the proper mode of closing the poll on the next day. The assessor there intimated his opinion, that votes examined after 3 o'clock might be added to the poll. On the 15th, 63 objected votes (the last of them that of J. Chalifont) were decided upon before 3 o'clock. At 3, the question, whether any more objected votes could be discussed after that hour, was argued before the assessor, and he determined to examine them. He desired that the reserved voters should be called for; and that those of them who appeared (in number 32,) should write down their names. He then proceeded to examine their cases in order. The examination lasted till 7 o'clock. If they were determined to be good, one of the poll-clerks, William Bury, referred to the original entry of the voter's name in the poll-books made when he first tendered his vote, and having administered the oaths to him in the presence of the undersheriff and the assessor, entered the word *jurat*, together with his own initials, W. B. before the voter's name, and then, asking him for whom he voted, made a mark under the name of the candidate. Of the number examined, 14 votes were decided to be good: of them 10 were given for Sir F. B. and 4 for Mr. M. It had been agreed between the candidates previously to the commencement of the election, that the oath commonly called the freeholder's oath, and the oath against bribery, should be the only oaths administered to the voters. It was understood to be required on each side, that these oaths should be generally administered during the whole election. But the assessor also stated, that during the examination, his opinion respecting the competency of the sheriff to add any of these votes to the poll had been changed; that he communicated this alteration to Mr. Shaw at Hounslow, where they had retired after the business of the

the day; adviſed him to review the deciſion of the former day, and to grant a ſcrutiny, if it ſhould be required. It appeared, that the officer of the ſheriffs who caſt up the poll at the cloſe of the 15th day, had made the numbers polled on that day (including the votes examined after 3,) for Sir F. B. 197; for Mr. M. 112: that upon a ſecond caſting up at Hounſlow, on the evening of that day, the numbers appeared for Mr. M. 110; which gave Sir F. B. a majority of one upon the whole poll. On the morning of the 16th Mr. Piggott, Mr. Serjt. Sellon, Mr. Taddy, and Mr. Courthope, preſented themſelves as counſel for Mr. Mainwaring, and offered a written claim on the part of Mr. M. and of certain electors, to have the return made as the numbers ſtood at three o'clock on the preceding day, and a proteſt againſt any alterations made or to be made in the poll, after that hour. This matter was argued by Mr. Piggott and Mr. Taddy; Mr. Plumer and Mr. Clifford argued on the part of Sir F. B. and chiefly inſiſted that the queſtion had been diſpoſed of the day before. It was admitted however, that the ſheriffs might alter their opinion, and reverſe their deciſion, if they thought proper. The aſſeſſor then told the ſheriffs that he thought they had no legal power to go on with the poll after three o'clock, and adviſed them to declare the numbers as they ſtood at that hour; which they did. They were,

For Mr. Mainwaring, . . . 2828
For Sir Francis Burdett, . . . 2823

The ſheriffs alſo, by the advice of their aſſeſſor, refuſed to examine any more of the reſerved votes: he was of opinion, that thoſe who had not anſwered to their names when called for on the preceding evening, were barred. They likewiſe refuſed to accede to a demand made by Sir F. B. after the numbers had been declared, that the poll ſhould be caſt up in the preſence of an agent of each party.

In the poll book for the Elthorn hundred, at the end of the 15th day's poll, was the following entry;

" The

"The following electors having tendered themſelves to vote before the hour of three, and their names, reſidence, freehold, and deſcription, entered in the poll books, and having been ſeverally objected to by the agents or inſpectors of Sir F. B. and G. B. M. Eſq. and brought round from the place of polling to the ſheriffs, for the purpoſe of having their right of voting decided, and that deciſion having been prevented by the great number of tendered votes ſtanding for diſcuſſion, were, after the hour of three, ſeverally called and appeared; and being heard, were adjudged good votes, and entered in the poll-book accordingly. Dated the 8th day of Auguſt 1804."

Then follow 14 names [e].

"The numbers upon the whole poll at 3 o'clock were,

For Sir F. B. 2823
For G. B. M. Eſq. . . . 2828."

"Examined, J. S."

The entry reſpecting the votes examined after three, was made at Hounſlow on the 16th day, previouſly to the ſheriffs coming to Brentford. The ſtate of the numbers at the hour of three, was entered on the poll book, by the aſſeſſor's deſire, on the afternoon of the 16th day, at the houſe of Sir Wm. Leighton, in Finſbury Square, after the return had been made and executed.

'It was admitted by the counſel for the ſitting member that the number of votes apparently ſcratched on the poll-book are for Sir F. B. 2833, for Mr. Mainwaring 2832; and by the counſel for the petitioners, that the numbers on the poll would be (excluding the fourteen votes mentioned in the memorandum at the ending of the poll), for Sir F. B. 2823, for Mr. Mainwaring 2828.'

It was proved, that the ſheriffs throughout the whole election, upon all occaſions, referred themſelves entirely to the opinion of their aſſeſſor, except in the caſe of one

[e] The poll, corrected by the addition of theſe numbers, would ſtand thus;

For Sir F. B. . 2833.
For Mr. M. . 2832.

particular

particular voter, whom they conſidered themſelves, contrary to his opinion, bound in conſcience to reject.

The vote of a perſon of the name of Chalifont, had been determined good before 3; he was ſworn, and the mark made againſt the name of the candidate for whom he voted after 3. Another voter (Mr. Birchall) was in the act of deſcribing the place of his reſidence at 3: his vote, conſequently, was given after 3. Theſe two votes were counted by the ſheriffs in the number of thoſe who voted before 3.

Defence of the ſheriffs.

The counſel for the ſheriffs, in their defence, declined arguing the point of law upon the return; but contended, that nothing had appeared which implicated his clients criminally, or ſuſtained the charges of wilful miſconduct that had been made againſt them; that they had manifeſted throughout the whole election the greateſt anxiety that juſtice ſhould be done to both parties; and that in deciding the queſtion of law as to the cloſe of the poll and upon their own power to decide upon votes after the hour of three on the laſt day, they had implicitly followed the opinion of their legal adviſer; and that this circumſtance was of itſelf ſufficient to remove from them every imputation of a ſiniſter motive, whether the opinion itſelf ſhould in point of law be judged a right opinion, or not. The reader will probably conclude from the nature of the evidence before ſtated, that theſe obſervations were well founded; and he will ſee from the report of the committee, that it was not thought neceſſary to paſs any cenſure upon their conduct.

The following is the ſubſtance of the arguments by which the counſel for the ſitting member attempted to juſtify his return.

Argument for the ſitting member.

Queſtion to be determined.

It is admitted on all hands, that the only queſtion before the committee upon the preſent trial, is, which of the two candidates is entitled to the return? It is clear that a due election has been had; neither will there be any doubt in whoſe favor is the majority, when it ſhall have been determined at what particular time the numbers ſhall be taken. The facts are rendered plain by the entries actually made upon the poll: the queſtion to be decided, is a queſtion of

Entry on the poll.

law, arising out of those facts. It will be insisted on, as a part of the argument of the petitioner, that the very circumstance of the entry of the names on the poll, of the 14 persons received after 3 o'clock, is conclusive upon this question; and it is admitted, that had those names been duly and legally entered on the poll, they must be considered here as forming part thereof, and that no inquiry can be now made with respect to their titles to vote, or to the circumstances under which they voted. But it will be shewn, that in point of law, these names constitute no part of the poll; that the poll terminated at three o'clock; and that every thing inserted in it after that hour, was inserted by no authority, and is a nullity, as much as if it were written therein at the present moment, by an entire stranger. The

What is the poll?

question therefore is, what is the poll? It is the formal entry of what took place while the electors were giving their voices; i. e. while the poll was actually taken. It is not material to the present question, minutely to discuss the nature, or the origin of polling. The time, when the conduct of polls began to be much attended to, is shewn by the time when statutes for their regulation began to multiply; when so many rules were devised for the conduct of returning officers; and so many provisions were made for securing to the electors the enjoyment of their just rights, and for preventing frauds. Such are check-books; inspectors; the oaths administered to the returning officer, to the poll clerk, and to the elector; the formality of taking down the name and place of abode of the voter; and the safe custody of the poll-books after the election is finished. It was also considered to be of the utmost importance that a precise limit should be fixed to the duration of the poll.

St. 25 G. 3. c. 84.

The st. 25 G. 3. c. 84. s. 1. has expressly directed, that no poll shall continue more than 15 days at most[f]; and that

[f] St. 25 G. 3. c. 84 s. 1. That from and after the first day of August 1785, every poll which shall be demanded at any election for a member or members to serve in Parliament, for any county, city, borough, or other place, within England, Wales, or for the town of Berwick upon Tweed, shall commence on the day upon which the same shall be demanded, or upon the next day at farthest, (unless it shall happen to be a Sunday, and then on the day

if ſuch poll ſhall continue until the fifteenth day, then ame ſhall be finally cloſed at or before the hour of 3 in afternoon of the ſame day. This is a remedial law. as intended, by confining the duration of the poll to ays, to prevent the recurrence of the miſchief and in- enience which took place at the election for Weſtmin- n 1784; and by directing that the poll on the laſt day d be diſcontinued on or before the hour of three, it was ded to prevent the confuſion that might ariſe from ing a long and keenly conteſted election to be con- d and declared at a late hour in the day.

ıe framers of this ſtatute had in view the attainment of blic object, by a general law, ſyſtematic in its nature, univerſal in its operation: againſt the application of a law, it is abſurd to ſuggeſt the hardſhip which may ıe to an individual freeholder, who tenders himſelf at a cular time, when from the neceſſity of the caſe, and

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er,) and ſhall be duly and regular- ceeded in from day to day, (Sun- cepted,) until the ſame ſhall be d; but ſo as that no poll for the n of any member or members to in Parliament, ſhall continue han fifteen days at moſt, (Sun- ncepted,) and if ſuch poll ſhall ue until the fifteenth day, then me ſhall be finally cloſed at or the hour of three in the after- of the ſame day: and the return- ıcer or officers at every ſuch elec- hall, immediately, or on the day fter the final cloſe of the poll, fairly, and publicly declare the or names of the perſon or perſons ıave the majority of votes on ſuch nd ſhall forthwith make a return h perſon or perſons, unleſs the ing officer or officers, upon a ıy being demanded by any candi- or any two or more electors, deem it neceſſary to grant the ſame; in which caſe, it ſhall and may be lawful for him ſo to do, and to pro- ceed thereupon; but ſo as that in all caſes of a general election, every re- turning officer or officers, having the return of a writ, ſhall cauſe a return of a member or members to be filed in the crown office, on or before the day on which ſuch writ is returnable, and every other returning officer or officers, act- ing under a precept or mandate, ſhall make a return of a member or members, in obedience to ſuch precept or man- date, at leaſt ſix days before the day of the return of the writ by virtue of which ſuch election has been made, and ſo that in caſe of any election, upon a writ iſſued during a ſeſſion or prero- gation of Parliament, and a ſcrutiny being granted as aforeſaid, then that a return of a member or members ſhall be made within thirty days after the cloſe of the poll, (or ſooner, if the ſame can conveniently be done.)

from the very provifions of the ſtatute itſelf, it has become impoſſible to determine upon the validity of his vote, and, of courſe, impoſſible to receive it. Leaſt of all, can ſuch a hardſhip be inſiſted upon in this caſe [f], of a ſmall county, where every freeholder had ample time to come in and give his vote, but where, as it appears, many of them wilfully delayed till almoſt the laſt hour. It is ſingular to obſerve, what miſapprehenſion has prevailed in the conſtruction of a ſtatute apparently of ſo clear a meaning. It has been erroneouſly ſuppoſed, that it is in the power of either candidate, under the terms of the ſtatute, to protract the duration

[f] The following liſt of the progreſſive ſtate of the poll, will ſhew with tolerable correctneſs the numbers who polled each day. In ſome trifling particulars it does not agree with the poll, as ſome perſons were added on ſubſequent days, whoſe votes were not counted in the numbers as they ſtood on the particular day on which they voted.

		B.	M.	Total.
23 July 1804.	1ſt day	611	528	1139
	2d	361	399	760
	3d	265	311	576
	4th	187	257	444
	5th	192	193	385
	6th	102	152	254
	7th	204	146	350
	8th	108	108	216
	9th	93	109	202
	10th	99	106	205
	11th	55	98	153
	12th	72	70	142
	13th	150	109	259
	14th	137	136	273
	15th	187	106	293
		2823	2828	5651
Received after 3 on the 15th day,		10	4	14
		2833	2832	5665

On the laſt day, 203 tendered their votes for Sir F. B., whoſe votes were not received before three o'clock. It appeared from the evidence, that the voters for Sir F. B. preſented themſelves, uſually, in great numbers at the poll, at about two o'clock. The poll cloſed each day, except the firſt and laſt, at four.

of

of the poll, in every caſe, for 15 days, provided he can produce voters to poll at certain intervals; whereas it is the plain duty of the returning officer to finiſh the poll with as much diſpatch as is conſiſtent with the rights of all parties, and with an allowance of a reaſonable time to all the electors to come in, and vote. It has been alſo ſuppoſed, that under the 3d ſection, the poll may not be kept open for more than 7 hours each day: whereas the ſtatute only preſcribes that number of hours as the leaſt period of its duration for every day, except the firſt. Hitherto, however, no doubt has yet been entertained upon the meaning of the words upon which the preſent queſtion turns: they are expreſs, and negative: they contain a direct prohibition to continue the poll beyond the limited hour on the laſt day. No legal mode of conſtruction can alter the ſenſe of theſe words [s]. The ſheriff is required immediately on the cloſe of the poll, or on the next day, to declare the majority on *ſuch* poll, &c. Although it is in his option as to the time of making the declaration, yet the thing to be declared, is the ſame; and cannot be altered by the time of declaring it. Now it is evident, that if he had declared the majority immediately, he muſt have made his computation of the number of votes actually received before three; how therefore can it be competent to him to declare a majority reſulting from a different computation?

It is plain, and it will be admitted on the other ſide, that the returning officer is diſabled, by this ſtatute, from polling any perſon after three, on the fifteenth day. But it will be ſaid, that the fourteen perſons in queſtion polled before three. It is ſubmitted, on the other hand, that nothing paſſed before three, which can be called polling, in any ſenſe of the word. They had (at moſt) tendered themſelves to vote; they had obſerved ſome forms, preparatory, and introductory to giving their votes; but the material and ſubſtantial part of polling remained; namely, taking the oaths required of them, and declaring the candidate for whom

The 14 had not polled before 3.

[s] See *ante*, vol. 1. p. 35. 43. 431. and ſee 2 Inſt. 28.

The tender of a vote; not polling.

they voted. It muſt be ſhewn on the other ſide, that the tendering was polling: but can it be pretended, that if, having tendered his vote for Sir F. B., any one of them had declared before the ſheriff that he voted for Mr. M., the ſheriff was not bound to add the vote to Mr. M.'s poll? If ſo, the tendering was not polling. The clauſe of the ſtat. 25 G. 3. c. 84. ſ. 5. (which preſcribes the general electors' oath) accurately diſtinguiſhes between the tender by the voter, and his admiſſion to poll. It is enacted, that every perſon *claiming* to vote, ſhall, (if required) *before* he is admitted to poll, take the oath, &c. The claim, is the tender of the vote; then follows the oath, if required; and laſt of all, the polling, which is the allowance, and exerciſe of the right which had before been claimed. Either the voter had polled at three, or he had not: if he had not polled, it is clear he could not poll after three; if he had polled, his vote could not be rejected after three, but ſhould have been counted upon the poll, whether he had afterwards attended for the purpoſe of examination, or not: but it is plain, from the conduct of all parties, that ſomething remained to be done, both by the voter, and by the ſheriff: the voters tendered themſelves to be examined; the ſheriff decided upon their titles; and adminiſtered the oaths to them. The petitioners' counſel required, even on the 16th day, that the remaining voters, who had tendered, ſhould be alſo examined: and, what is moſt important, the queſtion, for whom they voted, was not put to them till after the hour of three. Then, it is impoſſible to contend that what paſſed in the ſheriff's booth after three o'clock, can be called polling, in a legal ſenſe: for certainly, at that hour, the poll had ceaſed. To ſay, that a private poll could be carried on in the ſheriff's box in ſuch circumſtances, would not only be openly to violate the ſtatute, but to render nugatory all the other proviſions made for the conduct of county elections. The functions of the inſpectors, the check-clerks, and the poll-clerks had ceaſed. It would moreover be highly dangerous in many caſes, if the returning officer ſhould be permitted, by reſerving a number of votes to be decided upon

They could not poll after 3.

upon after the final cloſe of the poll, to reſerve to himſelf the power of giving the return to either candidate. Further, it appears from the circumſtance of the oaths not having been adminiſtered to the voters till after three o'clock, that they had not voted till after that hour. By ſt. 2 G. 2. c. 24. ſ. 1. every perſon lawfully required, muſt take the bribery oath *before* he is admitted to poll; and by ſ. 2. a penalty of 100*l.* is impoſed not only upon the returning officer who receives any one to vote before he has taken the oath, (when required), but alſo upon the elector who ſhall preſume to vote. By ſt. 7 & 8 W. 3. c. 25. ſ. 3. the poll-clerk was directed to be ſworn (among other things) to poll no freeholder who is not ſworn, if ſo required, &c. and it was enacted, that every freeholder *before* he ſhould be admitted to poll, ſhould, if required, take the oath therein mentioned: by ſt. 10 Ann. c. 23. ſ. 4. it was enacted, that every freeholder (if required) "*before* he is admitted to poll at the ſame election, ſhall *firſt* take the oath following," &c. And by 18 G. 2. c. 18. inſtead of the oath preſcribed by the ſtatute of Anne, every freeholder is enjoined, *before* he is admitted to poll, *firſt* to take the oath therein mentioned. In this caſe therefore, it being admitted that it was required on each ſide to put the oaths indiſcriminately to all the electors, it follows, that theſe 14 neither did, nor could poll before they had taken them[h]. It is ſubmitted alſo, that no power or authority remained in the ſheriff, or the poll-clerk, to put the oaths after the hour of 3: for the poll having then, in the words of the ſtatute, finally cloſed, and the authority given, being only to adminiſter the oath previouſly to the polling, the conſequence is, that the oath could not be adminiſtered after three. The oath of the voter taken in ſuch circumſtances, could not ſupport an indictment for perjury. But can it be ſaid, that the polling ſhall be cloſed at a certain hour, and yet, that ſomething may be done after that hour, which muſt *precede* polling?

Oaths adminiſtered after 3.

[h] It was proved, that by conſent of both parties, the putting the oaths to one of them, who voted for Mr. M. was waived.

Authorities. No deciſion of any former committee is applicable to the preſent ſubject. Caſes may be found in the Journals of votes diſcuſſed and added to the poll after the public taking of the poll had ceaſed; but as theſe caſes occurred before the ſt. 25 G. 3. c. 84. they can afford no authority upon the queſtion now before the committee. In general indeed, it is eaſy to find an authority in the Journals for almoſt any propoſition reſpecting the law of elections; and it is from a view of the variety and contradiction of the deciſions to be found there, that the advantage of the preſent mode of trial appears in its true light. With reſpect to the preſent queſtion, particularly, the ſt. 25 G. 3. ſeems, as it were, intended to prevent the diſtraction and confuſion which might ariſe from a ſeries of precedents, by which any courſe of proceeding whatever, might either be juſtified or condemned. The caſe of Bedfordſhire, 1784[i], is wholly different from this. Firſt, the return was amended by a correction and an alteration of what appeared on the face of the poll: whereas here, it is contended by the petitioner, that the return ſhould be amended by what actually appears upon the face of the poll, without any enquiry into the regularity of the mode or time of making the entries. The queſtion there turned upon the miſtake of the poll-clerk. The agreement made was, that no *tenders* ſhould be received after a certain hour; and that the poll ſhould be cloſed, as ſoon as the votes of thoſe who ſo had tendered had been examined, and decided upon. No preciſe hour was fixed at which the poll ſhould cloſe; nor was there at that time any preciſe limit for the duration of it, impoſed by law. It appears therefore, to have been underſtood by all parties, that the poll was finally cloſed, when all the electors who had tendered their votes had been examined, ſworn, and polled; not when they had tendered only; and therefore the authority of that caſe, if it can be at all brought to bear on the preſent queſtion, is favorable to the ſitting member. In the caſe of Caermarthenſhire, 1803, the ſheriff had refuſed to diſcuſs any tendered vote after the hour of three; and the election and return were ſuſtained[k].

Bedfordſhire, 1784.

[i] 1 Lud. 325. [k] *Ante*, Vol. i. 288, 289.

It

It cannot be ſaid, that by any application of the doctrine of relation to this caſe, what was done after three o'clock, can be conſidered as done before that hour [1]. This would be entirely to repeal the ſtatute; and to leave it in the power of the returning officer, by admitting any number of tenders on the poll, to protract the election to an indefinite time. The queſtion might be different, if it had appeared that the voter, before the hour, had done every thing required on his part to be done, and if nothing had remained but for the ſheriff to exerciſe his judgment upon the vote. It might then perhaps have been ſaid, that the voter having in fact polled within the legal period of time, the judgment of the ſheriff, though pronounced afterwards, might be referred to the act, upon which that judgment was given; but the facts of the preſent caſe raiſe no ſuch argument. Relation.

Neither is it at all material to the preſent queſtion, whether the ſheriff held out by his promiſe any expectation to the parties that the remaining votes ſhould be diſcuſſed and decided upon after three o'clock, nor whether any freeholder was injured or delayed by ſuch a promiſe having been made, and not fulfilled. This is matter for a petition on the merits of the election, for the purpoſe either of avoiding it, or of ſeating the petitioning candidate by the legal majority of votes, in contradiction to what appears on the face of the poll. Such a fraud of the returning officer conſtitutes a defect in the election, not in the return; and the application ſhould have been made to a committee who had the power to reviſe that error. It is not, however, pretended Sheriff's promiſe. Merits of the election.

[1] "Relation, is, where in conſideration of law, two times or other things are conſidered ſo as if they were all one; and by this the thing ſubſequent is ſaid to take effect by relation at the time preceding:" *Termes de la Ley*: Tit. Relation. But it is ſaid, 3 Co. Rep. 29. that "relations in many caſes ſhall help acts in law, but ſhall never help acts of the parties; that is to ſay, to make void acts of the parties good, by relation, or fiction of law." The reader who wiſhes to inform himſelf more thoroughly of the nature of this doctrine, may conſult the paſſages referred to in the index to Lord Coke's Reports; tit. Relation: and the numerous authorities collected in Jacob's Law Dictionary, under this title.

here, that any freeholder was miſled by that ſuppoſed promiſe; on the contrary, both the ſheriffs appear, on the laſt day, to have taken unuſual and extraordinary pains to prevent the accumulation of objected votes. But if the ſheriff had inadvertently made a promiſe, the performance of which involved a breach of the law, and of his own duty, and had afterwards preferred his promiſe both to the law and to his duty; it would have been incumbent upon the Houſe of Commons to have corrected his ill-adviſed pertinacity, and to have made the poll conformable, not to his promiſe, but to what the law required of him.

Interval between the cloſe of the poll, and declaration of the numbers.

It may be ſaid, that the length of the interval of time given to the ſheriff by the ſtatute between the final cloſe of the poll, and the declaration of the numbers, indicates, that it was given to him for the purpoſe of deciding upon votes which might be reſerved, and that ſo many hours could not have been allowed for the mere purpoſe of caſting up the numbers. But it will appear, upon a more attentive conſideration, that this inference cannot be ſupported. For the legiſlature could not mean that only a certain number of reſerved votes ſhould be decided upon; nor, that of a number of reſerved votes, ſome ſhould be decided upon, and others left undetermined. Had therefore, their deſign been, that any diſputed votes ſhould be determined upon after three o'clock, and that a ſufficient time ſhould be allowed for that purpoſe, they would have extended the time of declaring the numbers to a much longer period; ſince it well might happen that a much greater accumulation of reſerved caſes might take place. But when it is conſidered that the period of 15 days was aſſigned, not as the period to which by an abuſe and miſconſtruction of the ſtatute, any election *might* be protracted, but by which the election of the moſt populous county *muſt* be determined; and that the law no where preſcribes, or even contemplates, the practice of caſting up the numbers at the cloſe of each day's poll; the ſpace of one day for ſumming up the whole of the poll, for correcting any miſtakes which may have crept into it, and for accurately aſcertaining the number of

votes

votes polled for each candidate, cannot be deemed a long or extravagant delay, or a ſpace of time unſuitable to ſuch an object.

A member of the committee ſuggeſted as a topic for argument the ſt. 30 Car. 2. ſt. 2. c. 1. ſ. 4. which requires certain oaths and a declaration, to be "ſolemnly and publicly made and ſubſcribed betwixt the hours of nine in the morning and four in the afternoon," &c. by every "member of the Houſe of Commons, at the table in the middle of the ſaid Houſe, and whilſt a full Houſe of Commons is there duly ſitting with the Speaker in his chair:" and he adverted to the preſent practice of the Houſe, of ſuffering members to take the oaths, and to make the declaration after the hour of four. The counſel for the ſitting member obſerved upon this, that there was an eſſential diſtinction between the objects of the two ſtatutes: the eſſential object of the ſt. of G. 3. was the time; but the eſſential object of the ſt. Car. 2. was, the oaths to be taken; that it was meant that they ſhould be taken, not at any particular hour, but at the time when there was the fulleſt attendance of the Houſe: the ſeeming violation of the ſtatute, therefore, in this particular, was in fact, the beſt and moſt ſubſtantial obedience to it. St. 30 Car. 2. ſt. 2. c. 1.

The counſel for the petitioners argued againſt the return, as follows:

The Houſe of Commons having ſeparated the trial of the merits of the election from the queſtion upon the return [m], it is incumbent upon this committee to keep their attention excluſively fixed upon the matter ſubmitted to their judgment. The petitioners contend, that it was the duty of the returning officer, in the circumſtances which exiſted at the time when he declared the numbers, to have declared them in favor of Sir Francis Burdett. There will be an opportunity hereafter to correct the poll, and to enquire who had the real majority; ſince it will be competent to Mr. M., ſhould this queſtion be decided againſt him, to preſent a petition in the uſual form, and to ſhew his title to the ſeat by ſhewing that he has the legal majority of votes [n]. Argument for the petitioners.

[m] See *ante*, p. 340. note [c]. [n] See *poſt*, caſe LV.

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Diſtinction between the merits of the election, and the return.

The diſtinction between the queſtion of the return and the merits of the election, is commonly met with among the proceedings of the Houſe of Commons: It is to be found in ſt. 10 G. 3. c. 16. Petitions complaining of returns only, are put into a ſeparate claſs; and it has been a frequent practice, where both the merits of the election and the return are made the matter of the ſame petition, or of different petitions preſented at the ſame time, for the Houſe to direct the committee of elections firſt to examine the queſtion of the return, and to make a ſeparate report thereupon to the Houſe[o]. The caſe of Bedfordſhire, 1784[p], deſerves a particular notice; there were three candidates; Lord Oſſory was choſen by a conſiderable majority; Mr. St. John was returned as having a majority of one over Lord Ongley. Lord O. petitioned for the return to be amended in his favor, by the correction of a miſtake made in the poll. It was alleged, that a vote had been entered for Mr. St. John which had in fact been given for Lord O. and that the ſheriff (due application having been made to him for that purpoſe) ſhould have corrected that miſtake, and ſhould have declared the majority in favor of Lord O. It was much diſcuſſed in the Houſe, whether this petition related to the return only, or to the merits of the election; but it was finally determined to relate to the return only. The committee, forming their opinion upon the balance of the evidence on each ſide, reſolved, 1. "that the application to the ſheriff was ſuch, and made in ſuch time, as to call upon him to attend to it;" and 2. "that he ought to have taken the vote of William Lugſden from the poll of Mr. St. John, and added it to the poll of Lord Ongley." They then did what the ſheriff might, and ought to have done; they corrected the poll, and gave the return to Lord Ongley. Afterwards, the merits of the election became the ſubject of enquiry before another committee, (1785) who determined Mr. St. John to be entitled to the ſeat, by the legal majority of votes[q]. This caſe, therefore, affords a clear illuſtration of the diſtinction between the merits of the

Bedfordſhire, 1784.

[o] See the caſes collected in note (A) poſt.

[p] 1 Lud 323.

[q] 2 Lud. 381. 396.

election

election and of the return: it affords alſo a material authority with reſpect to the preſent queſtion. The caſe ſtates, that the poll was cloſed by agreement at ſix o'clock on Saturday, 17 April, with an adjournment of the county court to Monday the 19th, in order to conſider the rights of the votes tendered before ſix and not then accepted for want of time; to diſcuſs the votes queried during the poll; and to caſt up the numbers. This conduct was, in the ultimate event of the trial, ratified and approved by the committee; and hence it appears, that it is neither an illegal nor an improper act in the ſheriff, to employ the interval between the cloſe of the poll and the declaration of the numbers, in examining and deciding upon reſerved votes, although this intermediate act cannot properly be called either a poll, or a ſcrutiny. It is ſubmitted, that it is immaterial whether the poll be cloſed by the operation of the ſtatute, or by the act of the ſheriff and the conſent of the candidates[r].

Although it be true, however, that the queſtion upon the return is entirely diſtinct from any queſtion that might ariſe reſpecting the validity or merits of the election, it is by no means true, that the conduct of the ſheriffs may not, or ought not to be taken into conſideration, in diſcuſſing the queſtion upon the return. For not only are the ſheriffs accuſed of having acted criminally in making a falſe return, which charge would of itſelf give a juriſdiction to this committee to examine their conduct and motives in making it: but it will appear, upon reference to ſeveral of the caſes Sheriff's promiſe.

[r] The following agreement was entered into by the candidates, with reſpect to cloſing the poll:

"Bedford, Saturday, 17 Apr. 1784.

By the conſent of the candidates Lord Oſſory, Lord Ongley, and Mr. St. John, the ſheriff at the ſitting of the Court this morning, made proclamation for all freeholders now here preſent, who have not polled at this election, to tender themſelves to vote, and to enter their names by ſix of the clock this evening; and that no freeholder, who ſhall not have tendered himſelf, and entered his name with the ſheriff's ſworn clerks by that time can be received to vote at this election. And that the poll will be finally cloſed as ſoon as ſuch freeholders, whoſe names ſhall have been ſo entered ſhall have been polled.

(Signed,) Upper Oſſory.
Ongley.
St. A. St. John."

already

already cited, that the Houſe of Commons, when called upon to correct a return, have inveſtigated the proceedings of the returning officer, not only incidentally, with a view to cenſure or puniſhment, but as being immediately connected with the ſubject of their principal inquiry, and as involving a very material part of the merits of the return. And caſes have occurred, wherein the ſheriff, or returning officer has been made immediately reſponſible for his conduct reſpecting the return, although the merits of the election were expreſsly excepted from the examination of the committee.

Diviſion of the argument.

The argument for the petitioners will be divided into three parts: 1. with reſpect to what appears on the face of the poll itſelf, without any reference to the circumſtances of the caſe, or to any other extrinſic matter: 2. with reſpect to the evidence; of the rules preſcribed by the ſheriffs themſelves for the regulation of their own conduct; of the expectations held out by them to the parties; and of the proceedings of the parties themſelves in conſequence of their aſſurances: 3. with reſpect to the ſt. 25 G. 3. c. 84. ſ. 1. the words of which are ſo ſtrongly relied upon by the ſitting member.

Sheriffs bound to declare the actual numbers.

1. It is ſubmitted, in the firſt place, that the ſheriff was bound to declare the numbers as they actually ſtood upon the poll; and that the committee will give the return to him in whoſe favor the majority, upon the face of the poll, appears. In declaring the numbers, the ſheriff is purely miniſterial: having exerciſed his judgment in admitting or rejecting the reſpective voters who have preſented themſelves to him, he is not at liberty afterwards to reſcind his own adjudications. Such corrections are to be made hereafter, by a committee of the Houſe of Commons, appointed to reviſe his proceedings: but as to him, his own acts, and the record of them entered upon the poll, is concluſive, and binds him. In the caſes of Cumberland, 1768, and of Colcheſter, 1741[t], this principle was contended for, and adopted by the Houſe.

[t] See *poſt*, note (A.)

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The fact, of the votes having been received, decides the preſent queſtion in favor of Sir Francis Burdett. The reaſon, why they ſhould not have been received, (whatever it may be) raiſes a different queſtion, and forms the ſubject of a different proceeding. In this point of view therefore, conſidering the caſe ſingly with reſpect to the poll, without reference to any other point, or even admitting every other point to be adverſe to the petitioner, Sir F. B. is entitled to have the return amended in his favor.

Conduct of the ſheriffs.

2. Secondly, to conſider the ſubject with reſpect to the particular circumſtances of the caſe, it is ſubmitted that the ſheriffs were bound by their own acts, by the plans which they themſelves had adopted, reſolved upon, and communicated to the parties, to declare the return in favor of Sir Francis Burdett. It will be hereafter ſhewn that they were not prevented from purſuing the courſe which they had adopted, by any directions contained in the ſtatute. It is material, in this view of the caſe, to conſider the particular facts which have been proved before the committee. It appears, that towards the cloſe of the election, the attention of the ſheriffs, and their aſſiſtants, was drawn to an event which might very probably happen, namely, that ſuch an arrear might probably exiſt, at the final cloſe of the poll: and that a meeting was held at Hounſlow after the poll of the 14th day, for the expreſs purpoſe of conſidering it: that it was there ſettled, according to the opinion of the aſſeſſor, that ſuch voters who had been prevented from having their votes completely taken on the poll, whether by the interpoſition of the other ſide, or by the preſs of buſineſs preventing the aſſeſſor from deciding upon the objections, ſhould have an opportunity after three o'clock of having their claims diſcuſſed and allowed, provided they had previouſly done all which was required to be done on their parts. It appeared but juſt, and in favor of the elective franchiſe, that he who came at ten o'clock, and declared for whom he voted, ſhould not loſe his vote becauſe he who was to decide upon his vote delayed his deciſion upon it till four in the afternoon. It further appears, that on the morning of the fifteenth day, a diſtinct application was openly

openly made to the aſſeſſor, who then ſtated himſelf to be of the ſame opinion. Without entering into the difference of recollection that has ſubſiſted among the witneſſes, as to the acquieſcence in, or oppoſition made by the counſel for the ſitting member to that opinion, it is ſufficient to ſay, that admitting their diſſent to have been ſignified, it does not appear to have had any effect upon the minds of the ſheriffs, one of whom continued during the whole of the day, to promulgate in the moſt public manner, their reſolution to examine the deferred votes, after 3 o'clock. The effect of this aſſurance has been proved to be, that the inſpectors for Sir Francis Burdett relaxed in their exertions to have the votes for him received at the huſtings, and that they beheld the attempts made by the oppoſite party to ſecure their majority by general and indiſcriminate objections, with more indifference. But ſhould the ſame party now prevail, in proving that this aſſurance was fallacious, illegal, and void, the ſame thing which was then conſidered as the beſt expedient to prevent their undue machinations, will in effect have been more favorable to their object than if no ſuch expedient had been adopted to defeat them. In fact, however, this principle governed the proceedings of the whole of the fifteenth day; the voters having declared the candidate for whom they voted, their names, and their titles, contentedly withdrew themſelves, relying on the opinion of the ſheriffs, and their promiſe to do them juſtice, and hereafter to complete the only formality which was left unperformed, namely, the inſerting the mark in the poll, under the name of the candidate for whom the vote was given. It may be ſaid, that this delay was a matter of conſent; but it muſt be remembered, that conſent was only given upon the faith of the ſheriff's promiſe, and upon the expectation that every vote ſhould be decided upon, although after 3 o'clock. At 3 o'clock on the 15th day, the aſſeſſor, again, declared his opinion that the reſerved votes might and ought to be examined. Conformably to this deciſion they were in fact examined and decided upon in the afternoon of the 15th day, and upon the adjournment to Hounſlow the ſame evening, the poll, including thoſe votes, was ſummed up,

and

and the reſult appeared to be a majority of one in favor of Sir F. B. The aſſeſſor during all this time did not intimate the change of his opinion.

Theſe circumſtances have been inſiſted upon, not only with a view to ſuch cenſure, or animadverſion, as they may be thought to deſerve; but alſo, to incline the committee to hold the ſheriffs bound by that line of conduct which they at firſt declared themſelves reſolved to adopt, upon which they actually continued to proceed till the very cloſe of the election, and which they then ſuddenly changed, to the manifeſt advantage of one party, and the no leſs apparent injury of the other, who had acted upon the faith of their aſſurances. It is ſubmitted, that the rules of proceeding laid down by the ſheriffs for the conduct of the election, the agreement of the parties, the departure from ſuch rules and ſuch agreements, and the motives and reaſons thereof, are proper ſubjects to be taken into the conſideration of the committee, although the queſtion ariſe ſolely on the return; ſince the return itſelf is immediately affected by theſe circumſtances.

3. Thirdly, the ſubject is to be conſidered with reference to the ſtatute 25 G. 3. c. 84. ſ. 1. the proviſions of which the ſitting member inſiſts to be imperative, and to render every proceeding after the hour of three on the fifteenth day of the poll, entirely null and void; and he argues, that in this view of the caſe, the conduct of the ſheriff is foreign from the queſtion, which muſt be decided on the expreſs words of the ſtatute. If his conſtruction of it be true, it will follow, that if a voter come even on the tenth or twelfth day of the poll, and from a multitude of objected votes that ſtand for the ſheriff's opinion, or from the peculiar difficulty of their caſes, his title cannot be determined till after three on the 15th day, although he may have delivered his name, his freehold, and named the candidate for whom he votes; although he may even have been examined, and ſworn prior to three o'clock, yet the vote will be loſt, provided the ſheriff does not give his adjudication on the validity of it before three; for it is ſaid, the polling muſt

St. 25 G. 3. c. 84.

muſt be complete before three, and, that polling, in part, conſiſts of the receiving or allowing the vote by the ſheriff; and that every thing ſhort of that is no more than tendering.

Law before ſt. 25 G. 3.

It has been ſaid, and it is admitted, that the ſt. 25 G. 3, altered the time, but left the law, in other reſpects, as it ſtood before. Then let it be aſked, how did the law ſtand before? Before, the time was unlimited by law, as to three things: 1. the time in which the voter might come up, and declare for whom he voted: 2. the time in which the ſheriff was to make up his opinion as to the number of voters; to declare who had the majority; and to make the return. As to this; it appears that he frequently adjourned the poll for ſeveral days, that he might have time for deciding upon diſputed claims; and it was then competent to him to do ſo, provided only, that he made his return within the time named in the writ. The practice of entering votes on the poll, with a particular mark denoting that their titles were to be examined and decided upon hereafter, ſeems firſt to have been introduced at the cloſe of the 17th century, and to have frequently met with the ſanction and approbation of the Houſe of Commons[*]. 3. The time for which a ſcrutiny might continue. For each of theſe a time is fixed by ſt. 25 G. 3.; for the electors to come and declare their voices, before 3 o'clock on the 15th day; for the ſheriff to make up his final judgment with reſpect to the majority, before the end of the 16th day. It being conſidered, that at the end of 15 days, ſeveral doubtful caſes might remain to be decided upon, the ſpace of a day and a half is given to the returning officer, uninterrupted by the coming up of freſh voters, to decide upon the titles of ſuch electors as might ſo remain. Much critical obſervation has been applied to the words *ſuch poll*: there is no doubt that the majority muſt be de-

[*] Abingdon, 1688, 10 Journ. 123. Colcheſter, 1690, 10, 466. Wareham, 1690, 10, 520. Tregony, 1695, 11, 493. Devizes, 1690, 10, 521. Worceſter, 1693, 11, 83. Cumberland, 1768, 32, 27. Bedford, 1784, 1. Lud. 352. And ſee Caermarthenſhire, *ante*, vol. i. p. 289. Sed vide Shoreham, 1770, 33 Jour. 69. 1 Heyw. 334—341.

clared upon the numbers appearing upon *ſuch poll*, as has been taken during the courſe of the 15 preceding days; the examination by the returning officer is to be confined to ſuch perſons only whoſe names are entered upon ſuch poll; and who have cauſed their names to be inſerted therein before 3 o'clock. Before the end of the ſixteenth day, he is to declare who has the legal majority: that declaration is in fact, a ſentence, and judgment upon the validity of all ſuch votes as are neceſſary to give the majority to that candidate to whom in his opinion it actually belongs; and whether thoſe votes have been received abſolutely in the firſt inſtance, or conditionally, and ſubject to the judgment of the ſheriff hereafter, (the judgment being given before that majority is declared,) can make no difference. The ſheriff's opinion upon the vote may be deferred, but the vote itſelf is not delayed; and it is not neceſſary that the opinion ſhould be given till the end of the 16th day: for it is then, and not till then, that he is bound to declare who has the *legal* majority.

It is ſaid, that it is plain the oath could not be given after three o'clock; and, that as the oath muſt be given previous to the voter's polling, the polling could not legally take place after three; and that this argument is deciſive of the queſtion. It will appear however, that this reaſoning is not ſo concluſive as it is imagined. The oath is to be adminiſtered only at the demand of the candidate, or of an elector: it forms no part of the polling, nor is it eſſential to the validity of the vote: it is optional in the party to require it to be taken, and may be waived, either abſolutely, or conditionally. In this caſe, it was waived conditionally. The voter not being ſworn before three o'clock was the conſequence of the objection made by the other party, who inſiſted that his vote ſhould not be allowed in the firſt inſtance, but that he ſhould be ſent round to the ſheriff's box. The voter himſelf was willing to be ſworn at the time when he gave in his deſcription, but the party againſt whom the vote was to be given, inſtead of demanding that the oath ſhould be adminiſtered to him, inſiſted that it ſhould be poſtponed. Is it competent for the ſame party, now, to object Oath.

that the oath was not given in due time? If he has waived requiring the oath to be adminiſtered, till a time when the ſheriff has no authority to adminiſter it, and the oath itſelf is of no effect, it is he, (and not the voter who was ready to take it at the proper time) who muſt ſuffer for his own neglect. It therefore becomes immaterial to inquire whether an indictment for perjury could be preferred in the caſe of a voter who has been ſworn after 3 o'clock: of whatever obligation in point of law the oath may be, it is ſtill ſuch as the voter was required by the candidate to take; he was not bound by law to take any other. Poſſibly, it might be conſidered, that this was, ſubſtantially, taking the oath at the time the vote was given, and ſo might become good, by relation to that time, *viz.* before 3 o'clock. But it is to be remembered, that the freeholder's oath was not impoſed by the ſtatute now under conſideration; but by much earlier ſtatutes; namely, by ſtat. 7 & 8 W. 3. c. 25. ſ. 3. 10 Ann. c. 23. ſ. 4. 18 G. 2. c. 18. In all theſe, the elector is directed to take an oath, *previous to* polling, *if required*: it muſt therefore be ſhewn, that the requiſition was made that he ſhould be ſworn previous to his polling: if it has been required that he ſhould be ſworn at any other time, it is no cauſe of complaint to him who made the requiſition, that it has been complied with. It is to be obſerved, that ſince the making of theſe ſtatutes, it has been a very general practice for returning officers, in the interval between the cloſe of the poll and the declaration of the numbers, to exerciſe their judgment and receive evidence reſpecting votes, the validity of which during the poll they had not time to determine upon. In the caſe of Cumberland, 1768, that the ſheriff had not done ſo, was made the ſubject of the complaint of the petitioners, and of the cenſure and puniſhment of the returning officer; the Houſe reſolved, "that he had rejected votes received by him on the poll in favor of Henry Fletcher, Eſq. in order to create a majority in favor of Sir James Lowther, Baronet, without hearing counſel or admitting evidence in favor of the ſaid votes at the time of rejecting them, notwithſtanding his promiſe to hear ſuch counſel and receive evidence in their ſupport." In the caſes of Wareham

32 Jac. 361.

1690, and Tregony 1695[v], the practice of examining the queried votes after the final cloſe of the poll received the ſanction of the Houſe; yet neither in theſe caſes, nor in any other where the ſame practice appears to have prevailed, was any difficulty ſuggeſted as to the adminiſtering the oaths to the voters ſo examined ſubſequent to the final cloſe of the poll; although, by the argument on the other ſide, it ſhould appear that all theſe, if they were ſworn, muſt probably have been ſworn after the poll was finiſhed. Neither does it make any difference, whether it were cloſed by the agreement of parties, by the authority of the returning officer, or by the poſitive words of the act of parliament; ſo long as the poll was in fact finally cloſed, and the voter ſworn (as he muſt have been if he were ſworn at all) after the final cloſe. The fallacy of this argument ariſes from conſidering the enactment of the ſtatute to be poſitive and not qualified; as if it were in all caſes required by the law, and not (as in truth it is) made in all caſes to depend upon the option and act of the oppoſite party.

Analogy to caſes before the 25 G. 3.

It has been ſaid, that whatever theſe 14 voters did before 3 o'clock, can at moſt amount only to a tender of their votes, that they were not bound by thoſe tenders, and that any of them, after they had been ſworn, might have inſiſted that his vote ſhould be taken down for the other candidate. But it is ſubmitted, that even ſuppoſing it to have amounted to a tender only, it could not have been altered. The difference between a vote and a tender is, that a tender may be followed by the vote being rejected: if it be rejected, it cannot be counted in that election except on a ſcrutiny, or petition to the Houſe. But if, either on a ſcrutiny, or petition, it is found that the vote ought to have been received, it is not in the voter's power then to ſay, I tendered for A., but I now vote for B. He is as much bound by his tender, as by his vote; and his vote when allowed by the committee, is placed to the ſide of him for whom it was tendered. It is therefore ſubmitted, in this caſe, that the elector was irrevocably fixed, when he had declared for whom he

Voter bound by his tender.

[v] See 1 Heyw. 334. 10 Journ. 406. 11. 493.

voted. Polling is a complex act, conſiſting, partly of what is done by the elector, partly, by the returning officer. The elector, muſt declare his name, his title, and the perſon for whom he votes; when he has done that, the polling, *quoad* the elector, is at an end. The returning officer muſt allow his vote, and reckon it on one ſide or the other: in this part of the proceeding, the voter, as an actor, has no concern. When it may ſuit the returning officer to exerciſe his judgment upon the validity of his title, is not a matter within his power, or under his control. If he has performed what is required of him by the law, before three o'clock, he is a good vote before that hour, although the returning officer do not allow, or reckon up his vote, till after that time.

Poll, what is.

A poll is the taking the votes of the electors, individually, *per capita*. 1 Whitel. 393. Prynne Br. P. Red. 137. Glanv. 81. This might have been done formerly by the actual obſervation and memory of the returning officer: it is now required by ſtatute to be done in writing. The material act of polling is the act of the voter: it is the duty of the returning officer to enter the proper *memorandum* of that act having been performed. In this caſe it appears that the voters had done all that was neceſſary on their part; they had declared their names, their titles, and the candidate for whom they voted. It is plain therefore, that if the poll had been by parol only, and not in writing, it would have been competent to the ſheriff to count them among the number of thoſe who actually voted. The neceſſity of a written poll aroſe from the change of circumſtances. When the county court was frequented by the freeholders; when conveyances were public acts; and eſpecially, when ſeats in the Houſe of Commons were leſs eagerly ſought, the ſheriff met with no difficulty in aſcertaining the perſons who were choſen by the real majority. The time when undue practices firſt began to be reſorted to, is eaſily ſeen from the laws that were made to prevent them. The ſtat. 7 H. 4. c. 15. required the election to be made in the full county court, after previous notice, in order to guard againſt undue elections, which were "ſometimes made of affection

affection of ſheriffs:" the ſt. 23 H. 6. c. 14. preſcribed ſtill more particular regulations for the conduct of elections, becauſe, "that divers ſheriffs of the counties of the realm of England had not made due elections of the knights, nor in convenient time, nor good men and true returned:" at laſt, the ſt. 7 & 8 W. 3. c. 25. ſtill referring to the "evil practices and irregular proceedings of ſheriffs," &c. marked out their duties with ſtill greater accuracy and minuteneſs, and required the poll to be taken in writing. This regulation however, did not alter the ſubſtance of the thing done: the elector polled when he declared to whom he gave his vote; not when it pleaſed the ſheriff to make a memorandum of that declaration. The ſt. 10 Ann. c. 23. ſ. 5. requires that the place of the voter's abode ſhall be entered, as he ſhall declare the ſame *at the time of* the giving his vote; and here, the voter's place of abode was entered long before three. The judgment of the ſheriff, therefore, muſt be applied, by relation, to the time when the act required of the voter was done. The law of elections affords another remarkable inſtance of the application of the ſame doctrine. By ſt. 7 H. 4. c. 15. the election is to be made in the full county court, by all them that be there preſent; and by the writ it is required to be made "by thoſe who at ſuch proclamation ſhall be preſent;" yet, by the principle of relation, all thoſe who come in before the cloſe of the poll, are entitled to vote, as much as if they had actually been preſent at the beginning of the election, conformably to the ſtrict words of the writ, and of the ſtatute. At common law, if a party die after a ſpecial verdict is given, during the time the court has taken to conſider of their judgment, the judgment is entered up *nunc pro tunc*, as of the term when the *poſtea* was returnable [w].

Relation to the act of polling.

It is therefore ſubmitted that this return ſhould be amended, 1. becauſe it is contrary to the apparent majority on the face of the poll: 2. becauſe it is inconſiſtent with the rules laid down by the ſheriffs themſelves in the conduct of the poll: 3. becauſe it is contrary to the true meaning and ſpirit of the ſtatute.

[w] See Tidd's Practice, K. B. 846, 847. and the authorities there cited.

Decision and report. The committee determined, 5 Mar. that Mr. Mainwaring was not duly returned; and that Sir Francis Burdett ought to have been returned to ſerve in parliament for the county of Middleſex.

Return amended and leave given to Mr. M. to petition. The report was made to the Houſe the ſame day; and it was ordered, that the return ſhould be amended, by raſing out the name of Mr. M. and inſerting that of Sir F. B. inſtead thereof. Leave was given (6 Mar.) to Mr. M. and the freeholders of the county, to queſtion the election of Sir F. B. within 14 days, if they ſhould think fit[x].

Adjournment of the committee. Tueſday, 19 Feb. The chairman moved for leave to adjourn from this day till Thurſday next; the morrow being the day appointed for a general faſt. Leave given.

[x] See *poſt*, caſe LV.

NOTE (A), from p. 358, 360.

The following note contains a ſhort ſtatement of the ſeveral caſes referred to by the learned counſel in this trial; together with ſeveral others, in which the queſtion has ariſen, whether the merits of the election and of the return ſhould be diſcuſſed together, or ſeparately *. The reader will alſo find ſome material information in ſome of them, reſpecting the practice of entering votes upon the poll with queries, and of examining them after the poll has been cloſed.

Norwich, 1705. Norwich. 2, 3, Nov. 3, 6, Dec. 1705; a double return and two petitions: the majority on the poll was admitted to be in favor of Mr. Bacon and Mr. Chalmers, but the returning officer doubted whether or not they were eligible, not being free of the city. The committee were inſtructed to hear the matter of the return and of the election at the ſame time; and Mr. B. and Mr. C. were reſolved to be duly elected. 15 Jour. 11. 55.

Okehampton, 1705. Okehampton, 2 Nov. 20 Dec. 1705. A double return. Mr. Dibble in his petition ſtated himſelf and Mr. Northmore to have been duly elected, and returned, but that the mayor by

* See *ante*, p. 11. 143.

a con-

a contrivance, had been ſurpriſed into ſigning another return of Sir S. L. and Mr. Northmore: Sir Simon Leach petitioned againſt the return of Mr. Dibble; and the returning officer complained of the artifice by which he was induced to ſign Mr. Northmore's return. The committee were directed to examine both the matter of the return and of the election, at the ſame time. 15 Jour. 10, 72.

Returning officer petitions againſt his own return.

Old Sarum. 2 Nov. 11 Dec. 1705. A double return on account of an equality of voices. The committee were directed to examine the return, and the election, at the ſame time. 15 Jour. 12, 60.

Old Sarum, 1705.

Cirenceſter, 3 Nov. 1705. A double return for an equality of voices; the ſame direction was given, as in the former caſe. 15 Jour. 12.

Cirenceſter, 1705.

[Calne. 9 Jan. 1701. The ſame proceeding, 10 Jour. 65.]

Calne, 1701.

Clitheroe, 13, 14, 20, and 23 Jan. 1706. Mr. Dugdale, one of the bailiffs returned Mr. Parker; Mr. Pudſey, the other bailiff, returned Mr. Harvey; the former return had the common ſeal affixed thereto: the indenture by which Mr. Harvey was returned, purported to be between the ſheriff on one part, and both the bailiffs, together with the other burgeſſes, on the other; that by which Mr. Parker was returned, was between the ſheriff and one bailiff C. Dugdale, together with other burgeſſes: the Houſe directed the committee to hear the merits of the return in the firſt place; and upon examination of the matters above-mentioned, Mr. Harvey was declared to be duly returned. 15 Jour. 232, 252.

Clitheroe, 1706.

Steyning. 5, and 15 Feb. 1708. A double retnrn. Mr. Goreing ſtated that he had been duly elected; that the conſtable upon caſting up the poll three times, declared him to have the majority: that the *Duke of Richmond* demanded a ſcrutiny; but that the conſtable again declared that the petitioner was duly elected, and that he ſhould return him: that notwithſtanding this, in the evening he made a double return of the petitioner, and of Lord Bellew. Lord B. alſo petitioned. This matter was laid before the Houſe: and the queſtion concerning the return being firſt examined, it was reſolved that Mr. Goreing was duly returned; and the conſideration of the merits of the election was adjourned. 15 Jour. 93. 109.

Steyning, 1708.

Steyning, 29 Feb. 1711. Mr. Wallis petitioned againſt the election of Lord Bellew, claiming the legal majority of votes, and accuſing Lord B. of bribery. The Houſe inſtructed the committee

Steyning, 1711.

mittee in the firſt place to examine the matters of the return: the defect in which was, that the perſon named in the return was Lord Viſcount Bellew, by miſtake for Lord Bellew; and the return was amended accordingly. The merits of the election were afterwards reported; 8 May, 1712. The election was avoided. 17 Jour. 117, 215. See Elgin, &c. 7 Apr. 1715. 18 Jour. 54.

Monmouth, 1715. Monmouth, 11 June 1715. Mr. Windſor complained that he was declared to be duly elected by the mayor, and his return delivered to the ſheriff, who ſigned it, and gave it to the petitioner to carry to the under-ſheriff in London; but that the petitioner finds that another return made by perſons who had no right to do ſo, of W. Bray, Eſq. the ſitting member, has been annexed to the writ. The petition was heard at the bar of the Houſe: the counſel for the petitioner inſiſted in the firſt place, upon trying the queſtion of the return; the counſel for the ſitting member required that the merits of the election ſhould be proceeded on at the ſame time, and the Houſe reſolved accordingly. 18 Jour. 167.

Minehead, 1717. Minehead, 23 May, 1717. The conſtables of the borough, and the unſucceſsful candidates, petitioned the Houſe, and ſtated that the conſtables were the proper returning officers; and that the petitioning candidates had been duly elected: but that the ſheriff had refuſed to accept of the return made by the conſtables, and had received a return made by ſome few burgeſſes, of the ſitting members: the Houſe, after examining this matter cauſed the return made by the conſtables to be annexed to the writ, and gave the ſitting members leave to petition. They alſo adjourned the conſideration of the petition of the conſtables, and of Mr. Speake the lord of the manor of Alcombe, in the borough of M. who ſtated that the right of executing writs in the manor belonged to the tythingman. 18 Jour. 543, 555, 564.

Minehead, 1721. Minehead. 9 Jan. 1721. The return being made by the burgeſſes and not by the conſtables, contrary to the determination of the Houſe, 13 June 1717, a return of another candidate made by the latter was ordered to be annexed to the writ; with leave given to the ſitting member to petition; and the burgeſſes who made the firſt return were committed. 19 Jour. 705, 725. See ante, p. 329.

Inverneſs, 1722. Inverneſs, &c. 23 Oct. 1722. A petition againſt the return, ſtating that the ſheriff had refuſed to receive the return from the proper officer, and had returned another candidate; the Houſe reſolved, to conſider the merits of the return before thoſe of the election;

election; and ordered the return made by the proper officer to be annexed to the writ. 20 Jour. 36, 37. Aberdeen, &c. the ſame proceeding; 25 Oct. 1722. 20 Jour. 46. Dyſart, 27 Oct. 1722. 20 Jour. 48. Same proceeding; and the perſon who had taken upon himſelf to make the return contrary to the ſtat. ordered to attend; and (p. 92.) committed to the cuſtody of the ſerjeant at arms. N. B. In theſe caſes the ſitting members had leave to petition the Houſe. And ſee Perth, &c, 20 Jour. 49. Kilrenny, &c. ibid. Dumbarton, &c. 21 Jour. 104. Kilrenny, &c. 30 Jour. 508. Other caſes.

Milborne Port, 1 Feb. 1727. A diſputed claim by two officers to execute the writ; and a conteſted election; the Houſe directed the committee to proceed upon the matter of the return before they entered upon the merits of the election. 21 Jour. 28. Milborne Port, 1727.

Flint Borough, 31 Jan. 1734. 24 Mar. 1736. Sir John Glynne ſtated in his petition, that he had been duly elected; that the returning officers were in the intereſt of Sir G. Wynne his antagoniſt; that they illegally queſtioned the voters upon their oaths; that at the cloſe of the poll the petitioner had a majority of 12, and that the numbers, on caſting up the poll, were ſo declared and publiſhed; yet the returning officer without ſetting aſide any of the petitioner's votes, had returned Sir G. W. This petition was tried at the bar of the Houſe, and the petitioner having given evidence concerning the taking and cloſing of the poll, inſiſted that the ſitting member ſhould proceed to juſtify the return before the merits of the election ſhould be proceeded upon; but it was reſolved in the negative. 22 Jour. 338, 823. Flint, 1734.

Lauder, 14 Dec. 1741. A double return by two indentures. Both the candidates ſtated themſelves to be duly returned, and elected; ordered, that both the return and the merits of the election, ſhall be heard at the ſame time. 24 Jour. 20. Lauder, 1741.

Boſſiney, 9, & 11 Dec. 1741. John Robins the mayor, petitioned the Houſe, ſtating that the ſheriff inſtead of delivering to him the precept, gave it to the laſt mayor, who returned the ſitting members as duly elected; that the petitioner, who was the proper officer, returned J. Sabine and Chr. Tower, Eſq. who were duly elected; but the ſheriff refuſed to receive his return. The matter of this complaint was tried before the bar of the Houſe, 11 Dec. and the return ſigned by the petitioner was ordered to be annexed to the writ; leave being given to the late ſitting members, Boſſiney, 1741.

bers, to petition the Houſe within 14 days, if they thought fit. 24 Jour. 13, 16.

Denbigh-ſhire, 1741. County of Denbigh, 14 Dec. 1741. The petition of the freeholders ſtates, that Sir W. W. Wynn had a majority of 419 votes; that Mr. Myddleton his competitor, demanded a ſcrutiny, which was refuſed by the ſheriff, who declared the numbers in Sir W's favor; but afterwards privately ſtruck off near 600 votes from Sir W's poll, and returned Mr. M.

22 Feb. 1741. This petition was heard at the bar of the Houſe, and the petitioners ſuſtained their charges, by ſhewing that the ſheriff had declared the numbers in favor of Sir W. W. Wynn; that during the poll he had admitted ſeveral of the voters for Sir W. with queries; that he refuſed to make his return at the cloſe of the poll, till he had looked at his notes, and decided upon an objection of non-reſidence, of which he had doubts; and, upon the pretence of fatigue; that after making the return, he made a mark of D. which was ſaid by them to be a mark of diſallowance, (but by the ſitting member, to ſignify doubtful) againſt many of Sir W's votes, which had not been queried at the poll. 23 Feb. the witneſſes for the ſheriff having been called and their counſel heard; the Houſe reſolved, that at the laſt election, &c. for the county of Denbigh, the majority of the votes received upon the poll was for the petitioner Sir W. W. Wynn, Bart., and was ſo declared by the high-ſheriff at the cloſe of the poll; and that no alteration was made in the ſaid poll until after the high ſheriff had made a return of a knight of the ſhire, to ſerve in this preſent Parliament for the ſaid county:

That Mr. Myddleton was not duly returned: and that Sir W. W. Wynn ought to have been returned.

The counſel for the ſitting member then informed the Houſe, that owing to particular circumſtances they had not had any inſtructions from their client reſpecting his defence as to the merits of the election; upon which the return was ordered to be amended by inſerting the name of Sir W. W. W. inſtead of Mr. M. and leave was given to Mr. M. to petition the Houſe within 14 days. It was alſo reſolved that W. Myddelton, Eſq. high-ſheriff of the county of Denbigh, at the laſt election, having taken upon himſelf to return J. M. Eſq. as knight of the ſhire, to ſerve in this preſent Parliament for the ſaid county, contrary to the majority of votes received by him on the poll, without any ſubſequent examination into the rights of the voters, previous to ſuch return; and having afterwards preſumed to alter the ſaid poll in

in order to give a color to ſuch return, had acted partially, arbitrarily, illegally, in defiance of the laws, in manifeſt violation of the rights of the freeholders of the ſaid county, and in breach of the privileges of this Houſe. It was then ordered that he ſhould be committed to Newgate; and that an addreſs ſhould be preſented to his Majeſty to remove him from being receiver general of the land revenue in North Wales: and from his being a juſtice of the peace for the county of Denbigh. 24 Jour. 18, 89, 92.

Colcheſter, 15 Dec. 1741. The petition of Mr. Gray and Mr. Savill ſtates, that at the cloſe of the poll, by the agreement of all parties and the public declaration of the returning officer they had the majority; that a ſcrutiny was demanded by Mr. Olmius and Mr. Martin, the unſucceſsful candidates, and granted; but that upon ſome unreaſonable requeſt made by them under the countenance of the preſiding officer, and proteſted againſt by the petitioners, the ſame was not proceeded in; and that the returning officer returned the ſaid Mr. Olmius and Mr. Martin: "therefore as there ſtands upon the face of the poll a majority of votes for the petitioners, once received and never afterwards ſtruck out, the petitioners apprehend they ought at all events to have been returned". They alſo ſtated, that they had the actual majority of legal votes. This caſe was reported, 26 Feb. 1741: and the ſubſtance of the report is as follows; the petitioner's counſel having alleged that upon caſting up the numbers on the poll there appeared a majority for the petitioners; which numbers were accordingly declared; and that no proceeding was had upon the ſcrutiny demanded on behalf of the ſitting members, nor were any of the petitioners' votes diſallowed; they inſiſted, that the return ought to be amended, conformable to ſuch majority; and that it was impoſſible for them to proceed to object againſt a poll, which appeared to be in their favor; and which muſt be taken to be right till the contrary be ſhewn. Colcheſter, 1741.

Upon the evidence it appeared that the numbers were for Gray 832, for Savill 807, for Olmius 806, for Martin 790: that the poll was cloſed, and adjourned to the White Hart Inn; that there having been ſome diſpute about honorary freemen made in the years 1728 & 1729, whoſe votes at firſt were refuſed, it was inſiſted upon, and agreed to, that ſuch freemen as had been ſo refuſed, ſhould on their then appearance and tendering their votes, be added to the poll, in regard they were in the ſame ſituation with others, whoſe votes had been taken upon the poll; which was accordingly done. That then the numbers were caſt up, and agreed upon as already ſtated; on which the ſitting members

aſked

aſked for a ſcrutiny, which was granted, but not begun, as the ſitting members required that the right of thoſe honorary freemen ſhould be firſt decided upon; to which the petitioners objected. That there were a good number of queries put againſt the names of this claſs of voters upon the poll; and alſo againſt ſeveral perſons who were objected to as paupers, but whom the mayor received, ſaying there would be time to diſcuſs their right afterwards; but that the mayor, after the ſcrutiny had broken up, cauſed it to be declared that the ſitting members were duly elected.

Then the counſel for the petitioners acquainted the committee that they ſhould reſt the matter, with regard to the return, upon the preceding evidence. The counſel for the ſitting members inſiſted that it was not conformable to the methods of proceeding to determine the merits of the return, excluſive of the merits of the election, except in caſes where ſome irregularity appeared upon the face of the return, or where the ſame was not executed by the proper returning officer; that the poll is not part of the return, and that the return cannot be juſtified without entering into the merits of the election; which, they obſerved, the petitioners' counſel had in ſome degree entered into; that this was not the firſt inſtance of a return made contrary to a majority upon the face of the poll, the
(borough.) like being the caſe in the election for the *county* of Flint, in the laſt parliament; and that, on the hearing of the merits of that election, the 24th of March, 1736, the Houſe did not allow that the counſel for the ſitting members ſhould be directed to proceed in order to juſtify the return, before the merits of the election were proceeded upon. That though there may be an apparent majority upon the poll, the ſame may not be a legal majority; and as the returning officer is impowered by law, as well as bound by oath, judicially to determine upon the legality of votes, according to the laſt determination of the Houſe of Commons, his return is preſumed to be the reſult of that judgment: and they alleged, that, purſuant to the reſolution of the Houſe, read at the opening of the hearing of this election, the votes of ſeveral freemen made contrary to that reſolution, who offered to poll, were rejected, and others, though admitted, were polled with queries. They further alleged, that the petitioners' agents had no right to inſiſt upon the ſcrutiny's being put off when the ſitting members' agents were ready to proceed: and that thereupon Serjeant Price, who was legally deputed to act as returning officer, did afterwards diſallow the votes of the freemen made in 1728 and 1729, and declared a majority for the ſitting members

members. In reply to which, the petitioners' counſel anſwered, that the poll is concluſive evidence, and that the ſame cannot be altered but by a ſcrutiny; which, in the preſent caſe, was not proceeded in by reaſon the ſitting members' agents inſiſted upon an unreaſonable preliminary; and that though they admitted a returning officer had a right to exerciſe his judgment in reconſidering the poll, yet it did not appear ſuch judgment had been exerciſed in this inſtance. And it being the opinion of the committee that the counſel ſhould be called in, and that the counſel for the ſitting members ſhould be directed to proceed to juſtify the return, without entering into the merits of the election; the counſel for the ſitting members were ſo directed; and they proceeded to open the matter, which they intended to offer in juſtification thereof. And being directed to withdraw, the committee were informed that the ſitting members did not deſire to give the committee or the petitioners any further trouble as to the return, whereupon the committee came to the following reſolutions: Reſolved, that it is the opinion of this committee, that the majority of votes received upon the poll at the laſt election of burgeſſes to ſerve in this preſent Parliament for the borough of Colcheſter, in the county of Eſſex, was for the Petitioners, Charles Gray and Samuel Savill, Eſquires, and was ſo declared at the caſting up the numbers, at the cloſe of the poll, by the town-clerk, by the direction of Robert Price, Eſquire, ſerjeant at law, and deputy mayor of the ſaid borough; and that no votes were afterwards diſallowed.

The committee then declared their reſolution, upon the queſtion of the return, in favor of Mr. Gray and Mr. Savill; and the ſitting members offered to decline conteſting the ſeat upon the merits of the election, upon condition that the evidence already given ſhould not be permitted to affect hereafter the queſtion as to the right of voting in the borough; this propoſal being accepted, the petitioners were declared duly elected, and the report being made to the Houſe and agreed to, the return was amended accordingly. 24 Jour. 22. 98.

Bedwin, 7 Dec. 1747. A double return by the ſame officer: a petition againſt each return; each candidate claiming the right to be returned, and the majority of votes. It appeared upon the evidence (7 Dec. 1747,) that the double return was made by the conſent of the candidates; and further that this meaſure proceeded from ſome confuſion in taking the poll; but the preciſe queſtion is not ſtated. It was tried at the bar of the

Bedwin, 1747.

the Houſe; and the queſtion, that the return ſhould be conſidered ſeparately from the merits, was negatived. 25 Jour. 461.

Milborne Port, 1747.

Milborne Port. 17 Nov. 2 Dec. 1747. It was ordered that there be no proceedings upon the merits of the election, till the return had been fully conſidered. The queſtion, who was the proper returning officer, having been decided; the candidate returned by the proper officer was admitted to ſit. 25 Jour. 423. 458.

Northumberland, 1747.

Northumberland. 14 Mar. 1747. Mr. Allgood, the petitioner, ſtated that he had a clear majority on the poll; that the poll cloſed at four o'clock, 24 February; but that the ſheriff refuſed to make his return, and adjourned his court till 9 the next morning; during which time he privately ſtruck off many votes ſtanding on the poll for the petitioner, and declared the next morning, that the petitioner had a majority of 11 on the poll, but that he had rejected 27 of them: and thereupon returned Lord Oſſulſtone. The petitioner prayed that as he had a majority of votes on the face of the poll, none of whom were legally ſtruck off, the return might be amended in his favor. 14 Feb. the ſitting member deſired to give the Houſe no further trouble, and the poll being put in, the return was amended, leave being given to the ſitting member to petition, &c. 25 Jour. 565. 743.

Oxfordſhire, 1754.

County of Oxford. 3 Dec. 1754. A double return. Lord Parker and Sir Edw. Turner ſtated in their petition that they had a majority of legal votes, and ought to have been ſolely returned. Lord Wenman and Sir James Daſhwood complained of the partiality of the ſheriff, who declared the majority in favor of the petitioners, but having granted a ſcrutiny to the other candidates, allowed them to go through all their objections, before he would enter into thoſe that were made by the petitioners: that on the 30th day of May, (the 23d day of the ſcrutiny) he put a period to the ſcrutiny for the purpoſe of returning the writ, and returned all the four candidates, notwithſtanding the petitioners had then a majority upon the poll of votes not diſallowed; for which reaſon they prayed that the return might be amended in their favor. The numbers originally on the poll were for Lord W. 2033. Sir J. D. 2014, Lord P. 1919. Sir E. T. 1890. 3 Dec. the petition was heard before the Houſe, and the counſel for Lord W. whoſe name ſtood firſt in the return, were firſt heard: and they having produced the poll, and offered evidence as to what paſſed at the ſcrutiny, inſiſted that having ſhewn a majority on the face of the poll, in favor of Ld. W. and of Sir J.

D.

D. (whoſe caſe was the ſame as Ld. W's;) it was incumbent on the other ſide to attack that majority by objections to the votes, and that they had a right to reſerve their objections to the votes of Ld. P. and Sir E. T., till the caſe on the other ſide had been gone through; but the Houſe reſolved, on a diviſion, that the counſel for Lord W. and Sir J. D. be directed to proceed now upon the whole of the merits of the ſaid election, on their part. 27 Jour. 17, 18. 42.

Litchfield, 1 Feb. 1762. Mr. Meynell ſtated that the numbers declared on the cloſe of the poll were for Mr. Anſon 334, for Mr. Levett 313, for the petitioner 315; but that the ſheriff wrongfully granted a ſcrutiny to Mr. Levett, and ſtruck off 7 of the petitioner's votes, and returned Mr. Levett: and he prayed that the return might be altered. The ſheriff prayed to be permitted to vindicate himſelf againſt theſe charges; it was ordered accordingly, and the petition was tried at the bar of the Houſe, 21 Jan. 1762. The petitioner put in the poll, and proved that all the votes had been thoroughly diſcuſſed during the poll, which laſted 9 days. The counſel for the ſitting member were directed to confine themſelves to the matter of the return. Upon this, the counſel for the ſitting member produced ſuch evidence of the ſheriff's impartiality, that the counſel for the petitioner declined proceeding criminally againſt the ſaid ſheriff; and the counſel for the ſheriff declined offering any evidence on his part to the Houſe: the Houſe, upon reading certain parts of the original poll, reſolved not to proceed upon the merits of the election; and reſolved alſo, that the petitioner ought to have been returned; and on reading the proceedings in the caſe of Denbighſhire, 23 Feb. 1741, Malton, 14 Dec. 1708, and Stirlingſhire, 11 Jan. 1708., they directed the deputy clerk of the crown to attend the next day, and to inſert the name of Mr. Meynell in the return inſtead of Mr. Levett's. Leave was given to Mr. Levett to petition. 29 Jour. 17, 111, 114, 138. Litchfield, 1762.

Wells, 20 Jan. 1766. The return made by the proper officer annexed to the writ; and the ſitting member, who had been unduly returned, at liberty to petition. 30 Jour. 466. Wells, 1766.

Cumberland, 15 Dec. 1768. The petitions of Mr. Fletcher, and of the electors in his intereſt, ſtated that Mr. F. at the cloſe of the poll had a conſiderable majority; that the ſheriff after the poll had been cloſed took ſome days to make his return, alleging that he wanted to be ſatisfied as to the right of ſome perſons whom he had admitted to poll, in ſupport of whoſe rights he had promiſed to receive evidence and hear arguments; but that he re- Cumberland, 1768.

ſuſed to perform his promiſe, and arbitrarily rejected ſuch a number of Mr. F.'s voters, as to leave a pretended majority againſt him in favor of Sir James Lowther. It was therefore prayed that the return might be amended, &c. Both petitions claimed the majority in favor of Mr. Fletcher and Mr. Curwen, one of the ſitting members. A petition was alſo preſented from ſome freeholders in the intereſt of Mr. Senhouſe, ſtating that he ought to have been returned with Sir James Lowther, inſtead of Mr. Curwen. Theſe petitions were tried at the bar of the Houſe, and after general evidence being given of the partiality of the ſheriff in favor of Sir J. L., the witneſſes were further examined, in order to prove that the ſaid ſheriff admitted ſeveral votes upon the poll with queries, under a pretence that they were not freeholders, and with aſſurances that he would, at the cloſe of the poll, examine whether the eſtates for which ſuch votes were offered were freeholds or not; and afterwards, notwithſtanding ſuch aſſurances, the ſaid ſheriff refuſed to examine into the legality of the ſaid votes, although ſeveral times applied to for that purpoſe; and nevertheleſs, rejected the votes ſo queried at the adjourned court, although evidence was then offered to eſtabliſh the rights of the voters: the poll being read, the petitioners then inſiſted that having the majority of votes at the cloſe of the poll, Mr. F. ſhould be declared entitled to the return; and the counſel for Sir James Lowther being heard on the other ſide, offered in evidence certain reſolutions publiſhed by the ſheriff during the courſe of the poll, reſpecting the admiſſion and rejection of votes; and alſo gave evidence to ſhew the grounds on which he had queried the votes, and that he gave no aſſurances of receiving evidence, &c. after the cloſe of the poll, but that he declared himſelf ready to grant a ſcrutiny. The queſtion being put that the counſel for the petitioners ſhould proceed to the merits of the election, it paſſed in the negative; and it was reſolved that Mr. Fletcher ought to have been returned. Leave was given to Sir J. Lowther to petition. 32 Jour. 26. 27. 55. 83. 89. 95. 103. 107. *ante*, p. 366.

Shoreham, 1770.

Minutes of the committee.

Shoreham, 15 Dec. 1770. The returning officer admitted 87 perſons to take the bribery oath, and poll for the petitioner, Sir T. Rumbold. He put queries againſt 76 of their names, and ſtruck them off; and returned Mr. Purling, who had only 37 votes; becauſe he aſſerted that theſe 76 belonged to a club, which had been bribed. Evidence was propoſed to ſhew the conſtitution of this club, by the ſitting member; and that its deſign was to ſecure a ſeat to the candidate for a certain ſum. This was objected to, as involving the merits of the election, whereas the queſtion

queſtion now, was on the return; the ſitting member inſiſted on his right to diſqualify theſe voters in the preſent ſtage, and cited the following caſes. Lauder, 1741. 24 Journ. 20. Monmouth, 1715. 18 Journ. 40. Bedwin, 1747. 25 Journ. 424. 458. Flint, 1736. 22 Journ. 724, 823. Oxfordſhire, 1754. 27 Journ. 17. 42. In reply, the caſe of Denbighſhire was cited.

The committee determined that the counſel ſhould proceed. Afterwards, the petitioner was declared duly elected; but a ſpecial report was made againſt the club. See 33 Journ. 38. 70. 2 Heyw. 379.

Morpeth, 1775. Mr. Byron, and the electors in his intereſt, petitioned to have the return which had been made of Mr. Eyre, amended in his favor. A petition was preſented by Mr. Bigge, charging Mr. Delme and Mr. Byron with corrupt and illegal practices, by which a colorable majority had been obtained in favor of Mr. Delme, over the petitioner: another petition (of electors) claimed the ſeat in favor of Mr. Eyre and Mr. Bigge. The Houſe referred the two firſt petitions to be taken into conſideration 24 Jan. the two laſt, 12 July. See alſo, Downton, 1780. 1 Heyw. 340. *ante*, vol. 1. p. 340. And ſee Bedfordſhire, 1784. 1 Lud. 323.

Morpeth, 1775. 2 Ld. Gl. 145.

CASE LIV.

THE BOROUGH OF KNARESBOROUGH, IN THE COUNTY OF YORK.

The Committee was appointed on the 27th February 1805, and conſiſted of the following Members:

Lord Wm. Ruſſell, *Chairman.*
Lord Hen. Petty.
Rob. Adair, Eſq.
Viſc. Boyle.
Lord Lovaine.
Th. Tyrwhit, Eſq.
Th. Foley, Eſq.
Sir Wm. Mordaunt Milner, Bart.
Viſc. Ebrington.
Lord Oſſulſton.
Sir Rob. Lawley, Bart.
Hen. Holland, Eſq.
Hon. G H. Lawrence Dundas.
Hon. Cha. Grey, for the petitioners. } Nominees.
Hon. Cha. Lawrence Dundas, for the returning officers [a]. } Nominees.

Petitioners: Electors.
Counſel for the petitioners: Mr. Plumer; Mr. Adam.
for the returning officer: Mr. Topping.

Petition.

THE petition of certain lawful electors of the borough [b] ſtated that a writ having iſſued 9 July 1804, for the election of a burgeſs for Knareſborough, in the room of William Cavendiſh, Eſq. due proclamation was made by James Collins and John Carr, the bailiffs, of an election to be holden 30 July; and that the petitioners and ſeveral other voters were proceeding on the morning of the election to the tolbooth to give their votes, but that the ſaid election could not be proceeded in by reaſon of a very great riot and tumult, raiſed by a large number of perſons not electors, who aſſaulted ſeveral of the electors, magiſtrates, and con-

Election prevented by riots.

[a] See St. 25 G. 3. c. 84. ſ. 11, 12. 30 G. 3, c. 16. ſ. 11.

[b] Preſented, 24 Jan. 1805.

ſtables;

ſtables, and blocked up the paſſages to the tolbooth; that the bailiffs had made the following return, which had been tranſmitted to the crown office. We, the bailiffs of the borough of K. &c. having received the precept of the ſheriff for the election, &c. did, on the 25 July inſtant, make a proclamation, &c.: "that in purſuance of the ſaid proclamation we attempted to proceed to ſuch election with the aſſiſtance of Sir J. I. Bart. a magiſtrate for the weſt riding of the ſaid county, and of 20 ſpecial conſtables, but were unable to get to the court-room by the violence of the mob, conſiſting of ſeveral hundred people, who had previouſly obtained poſſeſſion of the ſtairs leading thereto, aided and inſtigated by the following perſons, viz. (8 perſons) and ſeveral others, whoſe names are at preſent unknown, who not only inſulted and pelted the magiſtrate and one of the returning officers, but alſo took the ſtaffs from the conſtables, knocked them down as well as ſeveral of the electors, and deſtroyed their cloaths, and alſo dragged one of the ſpecial conſtables, ſervant to the ſaid Sir J. I. a conſiderable diſtance to the river ſide, threatening to drown him; that after our return to the court-houſe, the ſaid Sir J. I. being afterwards accompanied by J. W. Eſq. and the Rev. C. K. two other magiſtrates for the ſaid weſt riding, finding that it would only endanger the lives of themſelves, the returning officers, and voters, if they attempted to proceed in the election, or to read the riot-act, but would be abſolutely uſeleſs, as there were no ſoldiers nearer than the barracks at York, being twenty miles from this place, except the volunteers of Knareſborough, ſeveral of whom were ſeen to encourage rather than ſuppreſs the mob; from the above circumſtances, we hereby certify, that we are unable to execute the precept as directed; as witneſs our hands, this 30th day of July, 1804. James Collins, John Carr." The petitioners prayed the Houſe to take the premiſes into early conſideration, that the petitioners might be repreſented in the preſent parliament, and that the offenders might be puniſhed.

Special return, that no election could be made.

St. 25 G. 3. c. 84. f. 10.

The ſt. 25 G. 3. c. 84. ſ. 10. was read, and the petition was ordered to be taken into conſideration 26 Feb. This was the firſt petition preſented ſince the making of that ſtatute, concerning a return, which was not a return of a member according to the requiſition of the writ, but containing ſpecial matters only concerning ſuch election [c].

[c] See caſe of Weſtminſter, 1784. 40 Jour. 13. 1 Heyw. 432. The clauſe of the ſtatute under which this petition was preſented, is as follows:

St. 25 G. 3. c. 84. ſ. 10. And whereas an act was paſſed in the 10th year of his preſent Majeſty's reign, (intituled, an act to regulate the trials of controverted elections, or returns of members to ſerve in Parliament,) and another act was paſſed in the 11th year of his ſaid Majeſty's reign, for explaining and amending the ſaid former act, and whereas no proviſion is made therein for the hearing and determining any petition, unleſs the ſame ſhall complain of an undue election, or return of members to ſerve in Parliament; be it therefore enacted, that from and after the firſt day of Auguſt, 1785, if upon any writ or writs to be iſſued for the election of any member or members to ſerve in Parliament, no return ſhall be made to the ſame on or before the day on which ſuch writ is made returnable, or if a writ ſhall have been iſſued during any ſeſſion or prorogation of Parliament, and no return ſhall be made to the ſame within fifty-two days after the day on which ſuch writ bears date, or if the return made in either of ſuch caſes ſhall not be a return of a member or members, according to the requiſition thereof, but contain ſpecial matters only concerning ſuch election: it ſhall and may be lawful for any perſon or perſons having had or claiming to have had, a right to vote at ſuch election, or claiming to have had a right to be returned as duly elected thereat, who ſhall think himſelf or themſelves aggrieved, to petition the Houſe of Commons concerning the ſame; and upon ſuch petition being preſented, a day and hour ſhall be appointed for taking the ſame into conſideration, and notice thereof in writing ſhall forthwith be given by the Speaker, to the petitioners, and to the returning officer or officers by whom ſuch return ought to have been made, or ſhall have been made, accompanied with an order to him or them to attend the Houſe at the time appointed, by himſelf or themſelves, his or their counſel or agents; and a ſelect committee ſhall be appointed according to the directions of the ſaid two recited acts for regulating the trial of controverted elections, which committee ſhall try and determine whether any, and which of the perſon or perſons named in ſuch petition ought to have been returned, or whether a new writ ought to iſſue, which determination ſhall be final to all intents and purpoſes; and the Houſe being informed thereof by the chairman of the ſaid ſelect committee, ſhall order the ſame to be entered in their Journals, and give the neceſſary directions for ordering a return to be made, and for altering the return if made, or for the iſſuing a new writ for a new election, or for carrying the ſaid determination into execution, as the caſe may require.

The

The allegations of the petition were clearly proved. It appeared that the election had been prevented by a tumultuous mob, gathered together early in the morning, before the commencement of the election, and even before the candidates had been declared[d]: and that it had been led on and directed by the persons who were complained of in the petition. No blame was imputed to the returning officers; and their counsel declined to address the committee on their part. Facts of the case.

The committee resolved, 1 Mar. that the petition was not frivolous or vexatious; and that the defence of the returning officers was not frivolous or vexatious: that a new writ ought to be issued for the election of a burgess to serve in this present parliament for the said borough: "that it is the opinion of this committee, that no election was held, nor any return made of a burgess to serve in parliament for the borough of K. in the county of York, in compliance with his majesty's writ, bearing date 9th July last past, directed to the sheriff of York for that purpose: Decision and report.

"That it appears to this committee, that John Carr and James Collins, bailiffs and returning officers of the said borough, were prevented from proceeding to the election of a burgess to serve, &c. according to the precept delivered to them by virtue of the king's writ as aforesaid, by a violent tumult which took place in the said borough on the 30th of July last past, the day appointed by proclamation for holding such election. That it appears to this committee, that 7 persons, (naming them) were principally concerned in instigating or committing the outrages that took place in the said tumult, whereby the returning officers were prevented from holding an election of a member to serve in parliament for the said borough." The report was made on the same day, and a new writ ordered. It was considered by the House, 14 Mar. when, after reading from the Journal, the entries in the case of Shaftsbury, 14 Feb. Proceedings in the House.

[d] See the case of Nottingham, *ante*, Vol. i. p. 88.

1776[e], and Ilcheſter, 18 May 1803[f], the Houſe agreed with the committee in their three laſt reſolutions, and ordered, that the Attorney General ſhould forthwith proſecute the 7 perſons named in the report, for their offences.

Proceedings at Law.

The information was tried at the ſummer aſſizes for Yorkſhire, 1805, when three perſons of the names of Allen, Abbott, and Dewes, were found guilty. On the 5th of February 1806, Allen (having been in the King's Bench priſon ſince 9 Nov. 1805) was ſentenced by the court to be impriſoned in Newgate 6 calendar months, and to give ſecurity for his good behaviour for 4 years, himſelf in 100*l.* and two ſureties in 50*l.* each. Abbott and Dewes were ſentenced to be impriſoned in the cuſtody of the marſhal of K. B. 3 calendar months, and to give ſecurity for 4 years, themſelves in 100*l.* each, and their two ſureties reſpectively in 50*l.* each. Abbott had been impriſoned ſince 9 Nov. 1805, and Dewes ſince 1 Feb. 1806.

Incidental point. Where notice need not be given to perſons complained of.

Before the ſpecial reſolutions relative to the miſconduct of the perſons complained of had been paſſed, it was aſked by one of the committee whether notice ſhould not have been given them of the charges made againſt them; but the counſel for the petitioners ſtated, that it was not uſual in ſimilar caſes to give a notice: that no notice was given where the individuals againſt whom a complaint was made, were *not* named in the petition: *à fortiori* it was unneceſſary, where they were named; ſince the charge againſt them became in ſome degree public, being entered on the Journal of the Houſe: that it was the common practice of committees to paſs ſpecial reſolutions reſpecting the miſconduct of individuals, as it was diſcloſed before them in evidence, although it was not made a matter of allegation in the petition, and although no notice had been given to the individuals; an inſtance of which was referred to in the caſe of

[e] 14 Feb. 2 Ld. Gl. 337. [f] *Ante*, Vol. i. p. 306.

Ilcheſter,

Ilchester, 1803 [s], where particular persons, by name, had been resolved to have been engaged in a system of corruption; and that resolution had been reported to the House. It was also stated, that no notice had been given to the sheriffs, in the case of Middlesex 1804, of the charges made against them. It was admitted, that in the present case no notice had been given to the persons accused.

[s] *Ante*, Vol. i. p. 306.

CASE LV.

THE COUNTY OF MIDDLESEX.

The Committee was appointed on the 7th of February 1806, and consisted of the following Members:

Rt. Hon. Isaac Corry, *Chairman.*
P. Langmead, Esq.
Ja. Daly, Esq.
Rt. Hon. Sir John Stewart, Bart.
John Palmer, Esq.
Sir Wm. Young, Bart.
Ja. Macdonald, Esq.
Rt. Hon. Geo. Canning.
Sir Jac. H. Astley, Bart.
John Prinsep, Esq.
Geo. Galway Mills, Esq.
Cha. O'Hara, Esq.
Jos. Holden Strutt, Esq.
Henry Joddrell, Esq. for the petitioners, } Nominees.
Lord Porchester, appointed by the first 13 [a], } Nominees.

Petitioners: George Boulton Mainwaring, Esq. and electors.
No party appeared in opposition to the petition.
Counsel for the petitioners; Mr. Piggott; Mr. Serjt. Lens; in the absence of either, Mr. Courthope.

MR. G. B. Mainwaring, and certain electors in his interest, petitioned [b] against the election of Sir F. Burdett [c], and stated that Mr. Mainwaring was entitled to the Petition

[a] See st. 28 G. 3. c. 52. s. 14.
[b] The petition was presented, 13 Mar. 1805, renewed 22 Jan. 1806.
[c] See *ante*, p. 370.

seat. The petition was ordered to be considered, 9 April. 22 Mar. the entries in the Journal in the case of Middlesex 26 April and 2 Jun. 1803 were read, and the consideration of the petition was fixed for 25 April; and it was ordered, that lists of voters objected to should be exchanged, on or before 15 April. 10 April an order was made for deferring the exchange of lists till 20 April, and the consideration of the petition till 7 May. 6 May, the Speaker informed the House that he had received a written declaration from Sir F. Burdett that he did not intend to defend his election[d]: the consideration of the petition was deferred till 7 June. 5 June a petition was presented from certain freeholders, stating that the first-mentioned petition had been presented to the House; that Sir F. B. had declared his intention not to defend his election or return; and praying, that under and by virtue of the provisions and enactments contained in st. 28. G. 3. c. 52. the petitioners might be admitted as parties in the room of the said Sir F. B. and be considered as such to all intents and purposes[e]. "Ordered, that the said petitioners be admitted parties in the room of the said Sir F. B. according to the prayer of the said petition. The consideration of the first petition was further deferred, by several orders, to 1 Aug. and on 17 June an order was made for the exchange of lists of voters objected to between the two sets of petitioners on or before 20 July. 12 July the parliament was prorogued till 22 August, and it met again 21 Jan. 1806. The petition of Mr. Mainwaring, &c. was renewed 22 Jan. The electors in the interest of Sir F. B. did not renew their petition; nor had they entered into any recognizances.

Sitting member declines to defend his seat.

Electors admitted parties in his stead.

Evidence before the committee.

The clerk of the crown produced the last return for the county of Middlesex, as amended by the order of the House, 5 March, 1805; and the order of the House that the return should be so amended, was likewise read in evidence. The poll for the last election was then put in; and

[d] See st. 28 G. 3. c. 52. s. 2 4. Flintshire, *ante* Vol. i p. 526. Liskeard, *ante*, p. 325.

[e] St. 28 G. 3. c. 52. s. 3. See *ante*, case of Ludgershall, 1791, Vol. i. p. 377.

the

the numbers appearing to be for Sir Francis Burdett, 2833; and for Mr. Mainwaring, 2832; the counſel for the petitioners produced evidence to diſqualify two of the voters for[f] Sir F. B.; upon which the committee (8 Feb.) reſolved Mr. Mainwaring to be duly elected. They alſo reſolved the petition not to be frivolous or vexatious; and that the election was not vexatious or corrupt[g]. The counſel for the petitioners ſuggeſted, that the committee could not declare the defence to be frivolous or vexatious in this caſe, ſince no party appeared in oppoſition to the petition; and the ſt. 28 G. 3. c. 52. ſ. 20. refers only to the oppoſition made to petitions by any party 'who ſhall have appeared before' the committee.

Petitioner proves his majority.

Election of ſitting member not vexations or corrupt.

[f] See the caſe of Waterford, *ante*, Vol. i. p. 239.

[g] St. 28 G. 3. c. 52. ſ. 18. If no party ſhall have appeared before the committee in oppoſition to ſuch petition, "they ſhall then report to the Houſe, whether ſuch election or return, or ſuch alleged omiſſion of a return, or ſuch alleged inſufficiency of a return, as ſhall be complained of in ſuch petition, according as the caſe may be, did or did not appear to them to be vexatious, or corrupt." See Flintſhire, *ante*, Vol. i. p. 528.

APPENDIX,

No. I.

THE BOROUGH OF LEOMINSTER, IN THE COUNTY OF HEREFORD, 1796.

The Committee was appointed on the 29th of November, 1796, and conſiſted of the following Members:

Wm. Praed, Eſq. *Chairman.*	Owen Williams, Eſq.	
Hon. Geo. C. Berkeley.	Sir Dav. Carnegie, Bart.	
Simon Yorke, Eſq.	John Blackburne, Eſq.	
Wm. Morton Pitt, Eſq.	G. W. R. Harcourt, Eſq.	
John Oſborne, Eſq.	D. Parker Coke, Eſq. for the petitioners.	Nominees.
Sir John Dashwood King, Bart.		
Geo. Chambers, Eſq.	Wm. Dundas, Eſq. for the ſitting member.	
Gerard Noel Edwards, Eſq.		

Petitioners: 1. Robert Biddulph, Eſq. 2. Electors.

Sitting Member: George Auguſtus Pollen, Eſq.

Counſel for the Petitioners: Mr. Serjt. Cockell; Mr. Piggott; Mr. Syer.

for the ſitting member: Mr. Dallas; Mr. Burton Mouſey.

ON the 30th of November, the committee being met, the petitions were read, ſetting forth, that the returning officer acted with great and manifeſt partiality in favor of the ſitting member, and againſt the petitioner, by receiving the votes of divers perſons for the ſitting member who had no right to vote, and by rejecting a great number of legal votes who tendered for the petitioner: that by theſe and other means a colorable majority of the vote was procured for the ſitting member over the petitioner, and that the returning officer did return the ſitting member as duly elected, Petitions.

[a] Mr. Biddulph's petition was preſented, 7 Oct. that of the electors, 20 Oct. See 52 Jour. 15, 45.

though

though there was a great majority of legal votes in favor of the petitioner over him.

Right of election agreed, 1725.

An entry in the Journal of the Houſe on the right of election was then read, which is as follows: "16th April 1725; the right of election was agreed to be in the bailiff, capital burgeſſes, and inhabitants of the borough, paying ſcot and lot.[b]" 20 Journ. 493.

After this the ſtanding order of the 16th of January 1735-6, was read.

Statements.

The counſel for the petitioners then delivered in the following ſtatement of the right of election: "The right of election for the borough of Leominſter in the county of Hereford is in the bailiff, capital burgeſſes, and inhabitants paying ſcot and lot."

The counſel for the ſitting member then delivered in a ſtatement to the ſame effect. [Theſe ſtatements are entered in the journal of the committee, and the lines are ſcored through.] The numbers on the poll as produced by the returning officer were as follows:

For Hunter - -	462
For Pollen - -	291
For Biddulph - -	290
Maj. for Pollen -	1

The counſel on each ſide propoſed to diſqualify ſeveral of the voters for the oppoſite party, upon the objections of felony; infancy; receipt of alms; want of inhabitancy; not having paid to the poor's rate; and not being poſſeſſed of rateable property. The committee do not appear, from the minutes, to have determined upon the title of any voter ſeparately. The following are the deciſions which were made during the trial.

[b] And ſee Jour. Apr. 3, 1701. Leominſter ſent members to Parliament, 26 Edw. 1. 4 Prynne, 1085. It is ſaid to have been incorporated by Q. Mary. Willis, Not. Parl. 3, 25. The bailiff of the borough is the returning officer. The petitioners in the preſent caſe, contended that the words 'paying ſcot and lot,' applied to the corporators, as well as to the inhabitants; but the committee do not appear to have come to any deciſion upon this point.

The

The counſel for the petitioners having in their opening impeached the validity of the poor's rates, the committee directed an argument upon that point on the fourth day of their ſitting. Arg. where the rate may be impeached.

The poor's rate of the 11th of November 1795 was made for one quarter of a year ending the 29th September of the ſame year. The rate of the 28th January 1796 was alſo retroſpective, being made for one quarter ending the 25th December 1795[c]. The ſignatures of the churchwardens and overſeers were not annexed to the laſt rate, and the allowance of the juſtices was written on a detached blank leaf. Under theſe circumſtances it was contended, that the rates were informal and void, and conſequently that the petitioners were entitled to go into evidence of rateability: that all rates ought to have a proſpective and not a retroſpective effect; as by paying to a retroſpective rate a perſon could not be ſaid to contribute to the preſent burthens of the pariſh, which is the baſis of the elective franchiſe in ſcot and lot boroughs: that if fraud could be proved in the concoction of the rate, the committee ought to receive evidence of it, though unappealed againſt; and that this was the practice of the ſuperior courts in the caſe of a fraudulent award. They alſo contended, that the allowance of the juſtices of the rate of January 1796, being written on a detached leaf, could not be deemed a legal allowance; and that as the rate was not ſigned by the churchwardens and overſeers of the poor, it was abſolutely void.

The counſel for the ſitting member contended that a retroſpective rate was valid according to principle and decided caſes. In the caſe of the King againſt the Inhabitants of Stapleton, rates made in 1766 to defray the expences of 1765 were held legal[d]; and in the caſe of Mitchell, 1784[e] the rate was retroſpective, and no objection made. To the objection, that the rate of Jan. 1796 was not ſigned by the

[c] The Parliament was diſſolved 20 May, 1796, and the new writs ordered to be returned 12 July.

[d] B. S. C. 649. See R. v. Inh. of Micklefield Cald. 507.

[e] 1 Lud. 93. See Leominſter, 1791. *ante*, Vol. i. p. 482.

church-

churchwardens and overſeers, it was anſwered, that it was only a continuance of the former rate, and that by ſigning one the other was alſo virtually ſigned; but admitting, that in point of law the rates were illegal, yet as they were not appealed againſt they muſt now be conſidered as valid; and the caſe of St. Giles Cripplegate *v.* St. Mary Newington, in Vin. Abr. tit. Settlement, K. 9. and Durrant *v.* Boyes, 6 T. R. 580. were ſaid to be directly in point. In the King *v.* the Inhabitants of Openſhaw, Burr. Sett. Caſ. 522. the rate was ſigned by three inhabitants: it was neither ſigned by the overſeers, allowed by the juſtices, or publiſhed in the church. Yet Lord Mansfield declared the rate was valid, ſufficiently to give the perſons rated and paying a ſettlement.

Deciſion. Rates retroſpective, and informally ſigned; yet if not appealed againſt, can't be impeached before the committee.

The committee, after deliberation, informed the parties by their chairman, that it was then too late to impeach either of the rates, and that being on the rates was evidence that the voter was poſſeſſed of rateable property on the 27th of November 1795, being 6 months previous to the election [f]. N. B. The evidence of fraud was very ſlight.

No evidence admitted, of the voter not having rateable property.

On the following day, the counſel for the petitioners propoſed to call a witneſs to prove, that a voter who voted for the ſitting member, was not in the occupation of any rateable property on the 27th of November 1795, but the committee determined that the propoſition was inadmiſſible. They then propoſed to give evidence, that certain perſons ſtanding on both rates, had ceaſed to occupy rateable property between the 28th of Jan. and the time of the election [g]; but the committee determined "that the above propoſition was inadmiſſible."

Deciſion and report.

On Saturday 10 Dec. The Petitioner declined any further proceedings on the merits of his petition and the ſitting member was declared duly elected [h].

[f] See the caſes cited in the note, *ante*, Vol. i. p. 479.

[g] As the evidence offered upon this point had no tendency to contradict the rates, it ſeems doubtful upon what principle this deciſion was founded.

[h] Reported, 12 Dec. See 52 Journ. 191.

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The following incidental points occurred.

Incidental points. Voter rated by a wrong christian name; bad.

Wm. Proberts was offered to be put on the poll for the petitioner. He was rejected by the returning officer as being on the November rate only. In the January rate the same premises were rated in the name of Thomas Proberts. The counsel for the petitioner proposed to add the name to Mr. Biddulph's poll, and to call the overseer to prove, that Wm. Proberts was the person rated, and that the christian name of Thomas was inserted by mistake, and that no other person than Wm. Proberts was intended to be rated, and that both rates in fact had been collected from Wm. Proberts. The counsel for the sitting member objected to this proposition, and the committee determined "that the overseer be not called [j]." On the following day the counsel for the petitioner proposed to call evidence to prove that William Proberts paid the two rates of the 11th November 1795, and 28 Jan. 1796; but the committee also determined that it was inadmissible [k].

Evidence of the payment of the rate, refused.

Petitioner having closed his case, not allowed to give fresh evidence to establish rejected voters.

The petitioner's counsel in his summing up of the evidence, proposed to add to Mr. Biddulph's poll John Bedford, rejected by the returning officer as being a person employed during the hop season as an assistant to the Excise, but the committee determined, 'that the counsel for the petitioner having proceeded to sum up, and having closed their case, be not permitted to endeavour to establish that vote [l].'

Declaration of the voter against his right after the election admissible.

Francis Weaver was objected to by the sitting member for having received parish relief within the year; and John Gethin was called to prove a confession of Weaver made after the election, that his wife had been relieved by the parish. This was objected to as being subsequent to the election; but the committee resolved, 'that the declaration of a voter, which tends to destroy his vote, is admissible, whether made before or after the election, unless that declaration goes to affect that voter with penal consequences [m].'

[j] See *ante*, p. 66, 67.

[k] See *ante*, p. 73. See *ante*, Vol. i. p. 63, 292, 338.

[m] See *ante*, p. 141, 142, 227, 228. Vol. i. p. 304.

Thomas

Petitioner having closed his case, not allowed to give fresh evidence to disqualify votes.

Thomas Bush was objected to by the sitting member for not having paid his poor rates previous to the election; and the overseer was called to prove the fact. He said, that it appeared from the rates, that he was in arrear. In his cross-examination, he was asked if it was an uncommon thing for persons to be returned in arrear; and particularly whether certain persons, naming them, had not been so returned. These persons had voted for the sitting member; but their votes had not been objected to in the opening of the petitioner's case. The counsel for the sitting member objected to any examination, after the petitioner had closed his case, for the purpose of shewing that particular voters not objected to in the opening of their case, nor made the subject of evidence in the progress of it, were not entitled to vote on the ground of non-payment of the sums for which they were rated. The committee determined, 'that the counsel for the petitioner having closed their case, shall not be permitted upon cross-examination, to go into evidence upon this head of objection.'

Tender.

It does not appear that the committee came to any determination upon the question of the tender of votes proposed to be added to the poll. See *ante*, p. 168.

APPENDIX, No. II.

THE BOROUGH OF MALMESBURY, IN THE COUNTY OF WILTS; 1796, 1797.

The Committee (in 1796,) appointed on the 1st of November, conſiſted of the following Members;

Sir Ch. W. R. Boughton, Bart. *Chairman.*	Joſ. H. Strutt, Eſq.	
Wm. Gore Langton, Eſq.	Edward Burrow, Eſq.	
Wm. Manning, Eſq.	Evan Nepean, Eſq.	
Wm. Morland, Eſq.	Wm. Wilberforce Bird, Eſq.	
Sir Jas. Stewart Denham, Bart.	Miles P. Andrews, Eſq.	
Hon. Evelyn Pierrepont.	Tho. Manners Sutton, Eſq.	} Nominees.
Hon. A. Foley.	John Fordyce, Eſq.	
Mark Pringle, Eſq.		

Petitioners: 1. James John Vaſſar, Eſq. 2. Burgeſſes.
Sitting Members: Samuel Smith, Eſq. Peter Iſaac Thelluſſon, Eſq.
Counſel for the petitioners: Mr. Graham; Mr. Dallas.
for the ſitting members: Mr. Adam; Mr. Lens.

THE petitions were read [a] containing an account, at ſome length, of the proceedings at the election, and a complaint of the conduct of the returning officer; they alſo ſtated, that the right of election did not only belong to the alderman and capital burgeſſes of the borough, but to the burgeſſes at large; the majority of whom had elected the petitioner, Mr. Vaſſar. Petitions. 1796.

Immediately after the petitions had been read, the committee required of the different parties a ſtatement of the right for which they reſpectively meant to contend [b]; when the petitioners ſtated the right to be "in the alderman, Statements of right.

[a] Preſented, 17 Oct. 1796, 52 Journ. 35, 36.

[b] See *ante*, p. 279 vol. i. p. 111.

capital burgeſſes, aſſiſtants, landholders, and commoners of the ſaid borough." The ſitting members, " in the alderman and 12 capital burgeſſes of the ſaid borough only."

The evidence and arguments in this caſe, and in the caſe of the ſame borough in the latter part of the ſame ſeſſion, being very nearly the ſame, the ſubſtance of both will be compriſed in one report; but as the circumſtances attending the ſecond petition were in ſome reſpects peculiar, and as the whole of the proceedings, both before the committees and afterwards in the Houſe, may furniſh an authority in future caſes, a ſhort ſtatement will be here given of them in their order.

Determination of right.

The committee determined on the 7th of Nov. that the right ſtated by the ſitting members, was the right of election in the borough of Malmeſbury, and that the ſitting members were duly elected; and they made their report to the Houſe accordingly [c].

New writ.

On the 9th of the ſame month, a new writ was ordered for a member to ſerve in the room of Mr. S. Smith, who had made his election for Leiceſter. Mr. Metcalfe was returned. Mr. Vaſſar again petitioned [d]; alleging as before, that the right of election was not in the ſelect body of alderman and capital burgeſſes, but in all the burgeſſes. A committee was appointed on the 5th of May 1797, to try the merits of his petition, and conſiſted of the following members:

2d election 2d petition.

1797.

Hon. Hen. Hobart, *Chairman.*	Cha. Cheſter, Eſq.	
Hen. Strachey, Eſq.	Wm. H. Fellowes, Eſq.	
A. Boucherett, Eſq.	Wm. Praed, Eſq.	
J. Blackburn, Eſq. of Aldborough.	Geo. White Thomas, Eſq.	
Rob. Clive, Eſq.	James Fox, Eſq.	
James Brodie, Eſq.	Boyd Alexander, Eſq.	} Nominees.
Sir Wm. Lowther, Bart.	Cha. Bragge, Eſq.	} Nominees.
Cha. Duncombe, Eſq.		

Petitioner: James John Vaſſar, Eſq.
Sitting Member: Philip Metcalfe, Eſq.
Counſel for the petitioner: Mr. Dallas; Mr. Milles.
for the ſitting member: Mr. Adam; Mr. Lens.

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[c] 52 Jour. 102. Dec. 1796. 52 Journ. 158.
[d] The petition was preſented, 6

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The petition was firſt read. Then the reſolution of the laſt committee upon the right of election, as reported to the Houſe; and the ſtanding order of the Houſe, 16 Jan. 173⅝, were read. It was admitted on the part of the petitioner, that his caſe depended entirely upon his eſtabliſhing the right of election mentioned in his petition. The committee required, as before, ſtatements of the right from each party; and the ſame ſtatements were given in as had been laid before the former committee. But before the counſel for the petitioner opened his caſe, the counſel for the ſitting member ſubmitted, that no evidence could be received to ſupport the right of election contained in the petitioner's ſtatement, or to impeach in any manner the right reſolved upon by the former committee, and reported by them to the Houſe of Commons.

Statements of right.

Whether a right reported, is concluſive within the firſt year?

They contended, that although the deciſion of the former committee was liable to be reverſed upon a petition of appeal, preſented within a year, according to the proviſions of the ſtatute 28 G. 3. c. 52. ſ. 25. yet it was final to all other purpoſes, and concluſive as to the right of election, upon any conteſt that might ariſe after the making of it, whether within the year, or after the expiration of it. By the ſt. 2. G. 2. c. 24. ſ. 4. a remedy had been provided for the uncertainty and fluctuation which had taken place in the deciſions of the Houſe. Upon the paſſing of the Grenville act, the boroughs which had not already been protected by a reſolution of the Houſe, remained ſubject to the ſame fluctuation; there being no ſimilar proviſion, whereby the deciſion of a ſelect committee was made final; but by the 28 G. 3. the deciſions of a committee, reported to the Houſe, were placed upon the ſame footing as thoſe of the Houſe had formerly been, ſubject only to be queſtioned in a particular manner, and according to certain forms preſcribed by the act. They are to be impeached by no other method; and therefore in this caſe the petitioner, who profeſſes to reſt his caſe entirely upon the proof of a right of election, different from that reſolved upon by the laſt committee, has miſtaken the proper courſe of his proceeding, which ſhould have been, firſt to ſet aſide the former deciſion, (to which alſo he himſelf was a party) by a petition of

Argument as to laſt determination. For ſitting member.

appeal; or at leaſt, at the ſame time when he preſented the preſent petition, to have alſo petitioned againſt the deciſion of the laſt committee; for otherwiſe it might happen that two or more committees ſitting to try the ſame queſtion of right, might come to different determinations, each of equal weight, entitled to the ſame reſpect, entered upon the Journals with the ſame forms, and even of the ſame authority, until the lapſe of a year ſhould make the firſt deciſion final, to the excluſion and repeal of all the reſt.

Argument for petitioner.

The counſel for the petitioner admitted that the deciſion of the firſt committee, if not appealed againſt, would, at the end of a year from its being reported to the Houſe, become final and concluſive, notwithſtanding any deciſions which might have taken place during the year; but they contended, that by the very words of the ſtatute 28 G. 3. c. 52. ſ. 27. the deciſion of the committee is made final, only *if no petition of appeal* is preſented within a year; which neceſſarily excludes the propoſition that it is final within the year. That the petitioner had adopted the only courſe by which he could obtain the object he ſought; namely, the ſeat; which was not to be affected by any petition of appeal. That the preſent petition and a petition of appeal, were of a nature perfectly diſtinct, the one being to aſcertain the right as an abſtract ſubject, the other to aſcertain a fact only, viz. whether the petitioner were duly elected; in reſpect to which, the right might indeed come in queſtion, but only as an incidental and collateral matter. Neither was there leſs difference in the forms preſcribed in proſecuting the two petitions; ſo that, had Mr. Vaſſar preſented a petition of appeal, as well as a petition for the ſeat, each petition muſt neceſſarily have been referred to a ſeparate committee, who might ſtill have decided differently, and the inconvenience and contradiction ſtated by the other ſide, would ſtill have remained.

Determination.

The committee having heard the arguments of two counſel on each ſide, determined that the petitioner ſhould proceed to open his caſe.

The ſubſtance of the evidence on both ſides is as follows:

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A charter of King Athelſtan is recited in that of King Charles the Firſt, (hereafter mentioned,) in theſe words; Charter of K. Athelſtan.

Ego Athelſtanus Rex Anglorum, Do pro me, et meis ſucceſſoribus, burgenſibus meis et eorum omnibus ſucceſſoribus Medulfuenſis burgi, quod habeant et teneant ſemper omnes functiones et liberas conſuetudines ſuas, ſicut tenuerunt tempore regis Edwardi patris mei, illibatè, et honorificè; et præcipio omnibus ſub imperio meo quod non faciant eis injuriam, et ſint quieti abſque Calumpniâ de Burghbote [e], Brugbote [f], Wardwyte [g], Horngelde [h], and Scot; et do et concedo eis illam Brueram Regiam quinque hidarum [i] terræ, juxtâ Villunculam meam de Nortana, propter auxilium eorum in conflictu meo contrà Daneos. Confecta eſt hujus donationis Cartula cum ſigno meo, per Teſtimonium Edmundi fratris mei, per Conſilium Magiſtri Walſini Cancellarii noſtri, et Odonis Theſaurarii mei, et Godwini. Godwinus qui fert Vexillum Regis perquiſivit hoc pro burgenſibus [k]. Sic in orig.

King Henry the Fourth, by his charter 2 July 1411, recites by Inſpeximus a charter of 5 R. 2 [l]. by which the foregoing charter of Athelſtan had been confirmed, 'præfatis burgenſibus ac eorum hæredibus et ſucceſſoribus, burgenſibus Villæ prædictæ:' It proceeds: 'Nos autem litteras prædictas et omnia contenta in eiſdem rata habentes et grata, ea pro nobis et hæredibus noſtris, quantum in nobis eſt, acceptamus, approbamus, ratificamus, et præfatis burgenſibus ac eorum hæredibus et ſucceſſoribus, burgenſibus Villæ prædictæ confirmamus, prout litteræ prædictæ rationabiliter teſtantur. Præterea, volentes eiſdem burgenſibus gratiam uberiorem facere in hâc parte, concedimus pro nobis et hæredibus noſtris, præfatis burgenſibus, quod licèt ipſi aut eorum anteceſſores ſeu predeceſſores, burgenſes 28 Nov. 5 R. 2.

[e] Auxilium dicitur quod ex conſuetudine debetur, ad reſtaurationem urbium, burgorum, caſtrorum. Spelman, h. v.

[f] Pontis refectio. Ibid.

[g] Immunitas a præſidiis faciendis; hic vero, mulcta pro wardâ non exhibitâ. Ibid.

[h] Tributum quod a cornutis animalibus exigitur. Ibid.

[i] A hide was ſaid to be 116 acres.

[k] King Athelſtan was buried at Malmeſbury, A D. 941. See Tindal's note to Rapin's Hiſt. Lambard's Dict.

[l] This charter of R. 2. could not be found.

villæ prædictæ, aliqua vel aliquid libertatum et Quietanciarum in dictis Chartâ et litteris contentarum, aliquo casu emergenti hactenus plenè usi seu gavisi non fuerint, idem tamen burgenses ac eorum hæredes et successores burgenses ejusdem villæ libertatibus et Quietanciis illis et earum quâlibet de cetero plenè gaudeant et utantur, sine occasione vel impedimento nostri vel hæredum nostrorum, Justiciarorum, Escaetorum, Vicecomitum, aut aliorum Ballivorum seu Ministrorum nostrorum quorumcunque. Hiis Testibus, &c. Datum per manum nostram apud Westm. secundo die Julij. Pro quinque marcis solutis in Hanaperio.

Cart. de anno Regni Regis Henrici quarti Duodecimo.

Prima pars patentium de anno regis Caroli undecimo.

11 Car. 1. ‘ Rex omnibus, &c. Cum burgus de Malmesbury in comitatu nostro Wiltes sit antiquus burgus, ac Medulfuensis burgus olim fuerit nuncupatus, cumque idem burgus extendit, et a tempore cujus contrarii memoria hominis non existit, extendebat se tam in et per totam villam de Malmesbury prædictam, quam in et per totam villam de Westport in eodem comitatu Wiltes: cumque burgenses burgi illius, ratione diversarum prescriptionum et consuetudinum a tempore quo non extat memoria in eodem burgo usitatarum, diversis libertatibus, franchisis, privilegiis, immunitatibus, et quietanciis usi et gavisi fuerunt; cumque Dominus Athelstanus quondam rex Anglorum chartam suam burgensibus ejusdem burgi fecit in hæc verba,’ &c.——The charter of Athelstan is here recited, and afterwards the charter of H. 4. (that of R. 2. being left unnoticed.) ‘ Cumque burgus prædictus modo sit populosus, ac præcipue de burgensibus pannificium et mercaturam strenuè exercentibus habitatus, cumque insuper quamplures transgressus et alia maleficia infra burgum prædictum in dies facti sint, et pro eo quod non sunt in burgo illo magistratus qui offensas ibidem perpetratas suppliciis per leges et statuta regni nostri Angliæ in reos hujusmodi constitutis debitè et festinè corrigant, sæpius fit quod malefactores impunè abeant,’ &c. &c. nos considerantes, &c. volumus et declaramus, ‘ quod burgus prædictus sit et de cetero imperpetuum permaneat liber burgus

Incorporation.

burgus de ſe, per totas antiquas priſtinaſque limites et bundas ſive terminatus, et quod homines et liberi burgenſes burgi prædicti et ſucceſſores ſui perpetuis futuris temporibus, ſint et erunt unum corpus corporatum et politicum, in re, facto, et nomine, per nomen aldermanni, et burgenſium burgi de Malmeſbury in comitatu Wiltes,' &c. &c.

The king after granting the uſual corporate privileges, conſtitutes the different members of the corporation; 'quod de cætero imperpetuum ſint et erunt, &c. unus qui aldermannus et duodecim alii qui capitales burgenſes et viginti quatuor alii qui aſſiſtentes ejuſdem burgi vocabuntur, qui quidem capitalis burgenſes, et aſſiſtentes, de tempore in tempus erunt conſulentes et auxiliantes aldermanno ejuſdem burgi pro tempore exiſtenti.' Conſtitution appointed by the charter. Aſſiſtants.

The alderman to be elected every year by the exiſting alderman and capital burgeſſes, from among the capital burgeſſes.

The office of capital burgeſs to be for life; and vacancies to be ſupplied by election of the alderman and the reſt of the capital burgeſſes from among the aſſiſtants.

The office of aſſiſtant to be alſo for life; and vacancies to be ſupplied by election of the alderman, capital burgeſſes, and the reſt of the aſſiſtants, 'de illis liberis burgenſibus ejuſdem burgi qui vocantur et a tempore cujus contrarii memoria hominis non exiſtit vocati fuerunt, *Landholders*.'

Then a power is given to the alderman and capital burgeſſes to amove or otherwiſe puniſh ſuch of the capital burgeſſes, aſſiſtants, or officers of the borough as ſhall miſbehave themſelves: they are alſo empowered to elect a ſteward.

Ambroſe Parris, alias Looker, 'a free burgeſs of the ſaid borough,' is appointed the modern alderman. 12 other free burgeſſes are appointed capital burgeſſes. 24 free burgeſſes are appointed aſſiſtants. Alſo the ſteward, and ſerjeants at mace, are appointed by name.

The alderman is made a juſtice of the peace within the borough; and coroner.

It is unneceſſary to inſert any more of the proviſions of this charter, which are very long and minute: it is ſufficient to obſerve, that the whole of the governing power is committed

mitted to the alderman and 12 capital burgeſſes, over all the inhabitants, reſidents in the borough: that the name of commoners does not occur throughout the whole of the charter; nor are any proviſions made concerning the free burgeſſes, who were underſtood to be the commoners, or corporators at large. The charter concludes with a confirmation to the alderman and burgeſſes of all the ancient privileges which, under whatever name of incorporation, by preſcription or otherwiſe, they have hitherto enjoyed. Both this charter, and that of W. 3. are entirely ſilent reſpecting the right of election. The date is the 24th of July, at Weſtminſter.

W. 3. In the reign of W. 3. a new charter was granted to the borough, all the members of it, except Lord Wharton the ſteward, having forfeited their offices by neglecting to ſubſcribe the aſſociation mentioned in the act for the better ſecuring of his majeſty's royal perſon and government. It is except in a few particulars, a mere copy of the charter of Charles: the material variations are theſe: the deputy alderman, and the ſteward are created juſtices of the peace, as well as the alderman.

After an incorporation as before of alderman, burgeſſes, &c. the alderman and *capital* burgeſſes are incorporated by the name of 'the alderman and capital burgeſſes of the borough of Malmeſbury in the county of Wilts,' with power to take lands, &c. and to have a common ſeal.

After reciting, that the alderman and capital burgeſſes by reaſon of ſundry preſcriptions and immemorial cuſtoms uſed and approved in the ſaid borough, have had and held to themſelves 'diſtinctè a cæteris liberis burgenſibus burgi prædicti,' a certain hoſpital called St. John's Hoſpital, and certain lands called the Alderman's Kitchen, the burgeſs parts, and the burgeſs lands for the ſupport of their offices and dignity, 'de certitudine juris et tituli ſui ad domum terras tenementa hereditamenta redditus et ſervitia prædicta aliquantulum dubitat. nos, volentes dubia hujuſmodi tollere, &c. concedimus et confirmamus præfato aldermanno & capitalibus burgenſibus,' &c. naming ſeparately the whole of the lands poſſeſſed by the ſelect body.

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The preciſe nature and conſtitution of the borough appeared from the oral evidence, and from the muniments of the corporation. And it may be here obſerved, that no records were ſaid to be exiſting of an earlier date than 1722; a circumſtance which occaſioned much obſervation on the part of the petitioner.

The corporation was ſaid to conſiſt of an alderman, 12 capital burgeſſes, 24 aſſiſtants, 42 landholders, and an indefinite number of commoners or free burgeſſes. The title to be received as a commoner was, the being the ſon of a commoner; marrying the daughter of a commoner; birth*; a continual reſidence and parochial ſettlement within the borough, and in all caſes an actual reſidence at the time of the claim. He who is thus qualified offers himſelf at a court of the borough, and if his claim be admitted his name is entered in a book, and he is then entitled to a right of common in the heath granted by Athelſtan, called King's Heath. Theſe commoners are generally in number about 200, or ſomething leſs; and ſucceed by ſeniority to the ſituation of landholder, whereby they become entitled to an acre of land. There are 42 landholders. The aſſiſtants have likewiſe an acre of land, retaining their right of common; and they are put into poſſeſſion of their office by the delivery of a turf. The capital burgeſſes, on their election, do not retain their acre of land, but acquire other lands of about the value of 10*l.* per annum to each. The alderman has in addition to this, four acres more, known by the name of The Alderman's Kitchen. Beſides theſe lands, there are ſome more, in and out of the borough, held by the corporation, the profits of which were ſaid to be applied to the feaſts of the alderman and capital burgeſſes.

* *Quære.*

There are two ſeals uſed within the borough; a larger one which is affixed to returns, and other inſtruments of a more public and ſolemn nature; a ſmaller, with which leaſes of burgeſs-lands, &c. are ſealed.

The aſſiſtants are ſummoned at the courts of the borough, by the ſerjeants at mace. Their preſence is required upon every matter of public buſineſs which occurs.

It was proved that as far back as memory or tradition could

Uſage.

could reach, the right of voting at elections had been exerciſed by the alderman and twelve capital burgeſſes only.

Returns. Malmeſbury, as Dr. Willis writes, firſt ſent members to Parliament 23 Edw. 1.; but the firſt return extant, (and which was produced in evidence) is 26 Edw. 1. [m], which is contained in the general return for the county. The members for Malmeſbury are ſtated to be returned pro communitate burgi. The returns of the 1 H. 5. & 5 H. 5. (the former of which is printed in Brady's Appendix, p. 31.) are in the ſame form. The firſt ſeparate return is 33 H. 6.; it is made by the alderman and burgeſſes, under a common ſeal, and is ſigned by at leaſt 14 names, beſides the alderman; it is mutilated and imperfect. It was ſtated that there were ſome intervening returns between 33 H. 6. & 17 Edw. 4. in the ſame form of a ſeparate indenture for the borough. But none other of the returns given in evidence were ſigned by more than 12 names, except thoſe made to the Prince of Orange's letters. The ſecond return produced was the 17 Edw. 4. which was by way of ſchedule for the whole county, as before [n].

In the 1 & 2 P. & M. the return is made by the burgeſſes only; and in the 3 Car. 1. it is ſtated, "The alderman has ſet his name as *a burgeſs*, and with the conſent of the burgeſſes has affixed the ſeal of the borough."

With theſe exceptions, from the firſt of Q. Mary to the 3d of April 1660, they are made by the alderman and burgeſſes, ſealed with the larger corporate ſeal, and ſtated to be "for themſelves and the whole body and inhabitants of the ſaid borough."

From the 13 Car. 2. they are made by the alderman and capital burgeſſes, for the whole body, or community, and are ſigned by the public ſeal: there are however, from time to time, ſome variations, which are here ſet down:

3 Nov. 25 Car. 2. "Edward Brown, alderman, Henry Arnold, and eleven others being all and every the ſaid burgeſſes of the ſaid borough."

[m] And ſee 4 Prynne, 1053, who ſtates the firſt return extant to be 26 Edw. 1. Brady, 110.

[n] See *ante*, p. 280.

The moſt remarkable difference appeared in the anſwer to the letter of the Prince of Orange directed 'To the chief magiſtrate, or ſuch others of the borough of Malmeſbury in the county of Wilts, who have right to make returns to ſerve in Parliament according to the ancient uſage of the ſaid borough before the ſeizure or ſurrender of charters made in the time of King Charles the Second[o].'" Prince of Orange's letter, 1688.

To this letter the following anſwer was returned;

"To the clerk of the crown in the Court of Chancery; Anſwer of the borough of M.

I, Elias Ferris, alderman of the borough of Malmeſbury in the county of Wilts, in purſuance of his Highneſs the Prince of Orange's letter for the chooſing of two members to repreſent this ſaid borough in the convention to be held at Weſtminſter the two and twentieth day of this inſtant month of January, and in obedience thereunto have (after due notice given) cauſed an election to be held and made according to the ancient uſage of the ſaid borough, and do hereby certify and declare that the Hon. Colonel Henry Wharton and Colonel Charles Godfrey are, by the free and unanimous conſent of the capital burgeſſes and other inhabitants of the ſaid borough, duly and legally elected to ſerve for and repreſent the ſaid borough in the ſaid convention of Parliament to be held the ſaid two and twentieth day of this inſtant January, there to conſult and agree of and to all ſuch matters and things as ſhall be there treated of for the good of the weal public. In witneſs whereof I have hereunto affixed the common ſeal of the ſaid borough, this 15th day of January Anno Dom. 1688-9.

Elias Ferris, Alderman.

In further teſtimony whereof we the capital burgeſſes, aſſiſtants, landholders, and other the free burgeſſes of the borough of Malmeſbury in the county of Wilts, have hereunto ſet our hands.

[o] The letter itſelf may be ſeen in the 10th volume of the Journals, p. 7 & 8; it directs the elections to be made "by ſuch perſons only, as, according to the ancient laws and cuſtoms of right ought to chooſe members for Parliament;" and requires the returns to be made before the 22d day of January. The date is at St. James's, 29 Dec. 1688.

Signed

Signed by 10 'capital burgeſſes;' 15 'of the company of aſſiſtants;' 19 'landholders;' and 27 'commoners.'

In the 3 W. & M. the return is, by the alderman and burgeſſes, with the whole aſſent and conſent of the capital burgeſſes of the ſaid borough.

1 Ann. By the alderman and burgeſſes, with the conſent of the reſt of the burgeſſes.

Journals. The Parliamentary hiſtory of this borough is further to be collected from ſeveral paſſages of the Journals of the Houſe of Commons;

27 May 1685. 9 Journ. 720. A petition of Henry Wharton and William Jephſon, Eſqrs. was read; its contents are not ſet forth there. The following is a copy of it;

Petition of Mr. Wharton and Mr. Jephſon. The humble petition of Henry Wharton and William Jephſon, Eſqrs. Sheweth, that whereas your petitioners were, by the unanimous conſent of all the burgeſſes and inhabitants of the ancient borough of Malmeſbury, in the county of Wilts, elected and choſen to ſerve burgeſſes for the ſaid borough in this preſent Parliament; and by an indenture ſealed with the ſeal of the corporation accordingly returned; yet notwithſtanding, one Thomas Stump, who is not either burgeſs or inhabitant within the ſaid borough, did cauſe certain perſons, to the number of thirteen or thereabouts, to aſſemble in order to an election, when ſome of the ſaid perſons were, and ſtill are, inhabitants in another county, and none of the reſt were burgeſſes or inhabitants within the ſaid borough; and the ſaid perſons ſo aſſembled did, without the conſent or approbation of any of the burgeſſes or inhabitants aforeſaid, make an inſtrument in the nature of an indenture from the ſaid corporation for the election of Sir Thomas Eſtcourt and John Fitzherbert, Eſqrs. as burgeſſes to ſerve for the ſaid borough; and the ſheriff of the ſaid borough of Wilts hath cauſed the ſame to be annexed to the precept and returned unto the crown-office, refuſing to accept of the indenture aforeſaid, whereby your petitioners are, by the unanimous conſent of the ſaid burgeſſes and inhabitants of the ſame borough, elected as aforeſaid. No proceedings upon this petition appear in the Journals.

23 Jan. 1688. 10 Jour. 13. Col. H. Wharton, who had been returned both for this borough and for the county of Weſtmorland, made his election to ſerve for the latter; whereupon, in conſequence of another letter dated the 24th of January 1688-9, another return was made ſimilar to the former in all reſpects; by which the Hon. Colonel Tollemache was elected. This return is dated the 30th of January 1688-9. The Convention Parliament was diſſolved 6 Feb. 1689-90. The next parliament met 20 March 1689-90.

Petition of Mr. Howard, and Sir T. Eſtcourt.

1 Apr. 1690. 10 Jour. 361. A petition of Craven Howard, Eſq. and Sir Thomas Eſtcourt, Knt. was read; ſetting forth, that the petitioners were legally elected by eleven of the thirteen electors for the borough of Malmeſbury in the county of Wilts; nevertheleſs one Elias Ferris and the ſheriff have returned Edward Wharton [p], Eſq. and Sir James Long, in prejudice of the petitioners.

This parliament was prorogued on the 23d May 1690, and met again the 2d of October. No further proceedings upon this petition appear: but it ſhould ſeem that the ſitting members kept their ſeats; for on the 25th of Jan. 1691 a new writ is ordered for Malmeſbury in the room of Sir James Long, Bart. deceaſed.

Agreements of the right.

29 Mar. 1699. 12 Journ. 622. "The right of election was agreed to be in the alderman, and twelve capital burgeſſes."

13 Dec. 1722. 20 Journ. 77. It was agreed, "to be in the alderman, and 12 capital burgeſſes." The committee alſo reported, "that it was admitted and it appeared by the charter, that this corporation conſiſts of one alderman, twelve capital burgeſſes, and 24 aſſiſtants: that the alderman and the twelve capital burgeſſes, for the time being, or the major part of them, are the governing part of the corporation; and by them the capital burgeſſes are to be elect-

[p] It is ſo ſtated in the printed Journals; but in the copy of the petition, which the reporter has ſeen, the ſitting member is ſaid to be the Hon. Goodwin Wharton.

ed,

ed, out of the 24 aſſiſtants." Upon the merits of the caſe, which have no relation to the preſent purpoſe, the petitioners were declared duly elected.

Queſtion in this caſe.

The only queſtion in this caſe was, whether or not the right of election was excluſively confined to the alderman and capital burgeſſes? For if it belonged to any of the other parts of the corporation, viz. to the aſſiſtants, landholders, or commoners, the petitioner had the majority of votes.

Obſervation upon the points in diſpute.

The caſe was ſo ably inveſtigated and diſcuſſed on both ſides, during the trial of the two cauſes, and particularly of the laſt of them, that the queſtion, at laſt, aſſumed a very ſimple and diſtinct ſhape. The facts from which it aroſe, and the general principles upon which it was to be decided, being, for the moſt part, agreed upon, a mere ſtatement of that which was admitted, will ſuffice to introduce the reader to the points in diſpute.

Firſt, as to the facts, it was agreed, that the charter of Athelſtan was a ſufficient charter of incorporation of all thoſe perſons to whom the land therein mentioned was granted, even ſuppoſing them not to have been already incorporated by ſome grant of Edward the Elder referred to in that charter: that it ſufficiently appeared by the immemorial enjoyment of that land, who the perſons incorporated were, namely, the landholders, and commoners. That the borough of Malmeſbury had ſent members to parliament as early as any other borough: that the returns were corporate returns; and that the elective franchiſe in this borough was a corporate right, exiſting in thoſe to whom it belonged, in their corporate character: that the earlier returns were conſtantly made under the name of the alderman and burgeſſes. That this word was of various and flexible import; and that, as in other caſes, ſo its meaning when applied to this particular place was to be collected from the hiſtory and circumſtances of the place. It was further agreed, that as in point of fact the charters of King Charles and King William were entirely ſilent with reſpect to the elective franchiſe, ſo, in point of law, their proviſions could neither incidentally or otherwiſe, have any operation, to alter, abrogate, or reſtrain that right, as it antecedently exiſted

from

from time immemorial: that if the antecedent right could be once clearly ſhewn, different from the right now exerciſed, the latter could not be protected even by the longeſt uſage in its favor. Theſe things being admitted, the only queſtion left for the deciſion of the committee was, whether or not it had been ſhewn on the part of the petitioner by argument or by evidence, that the right of election did not originally belong to the ſelect body of alderman and capital burgeſſes. And the petitioner contended, firſt, that the right was in no ſelect body, or particular part, but in the whole corporation at large; ſecondly, that if the committee ſhould be of opinion it was in a ſelect body, that the ſelect body muſt be held to conſiſt of the alderman, capital burgeſſes, and aſſiſtants, and not of the alderman and capital burgeſſes only.

Argument for the petitioner.

Argument for the petitioner.

Firſt, the hiſtory of the borough does not afford a trace of the exiſtence of any ſelect body previous to the charter of Charles the firſt, much leſs of the exiſtence of that particular body then conſtituted. The right of election is immemorial; therefore the body in which it reſides muſt be alſo immemorial; for it is plain, if the right be immemorial, and the origin of the preſent poſſeſſors of it can be ſhewn, that the right muſt formerly have belonged to others.

Commencement of the ſelect body.

Now it is evident that the charter of Charles the firſt created the capital burgeſſes. Whoever attends to the form and object of that charter, will obſerve that it is both a charter of privileges, and of government; that with reſpect to privileges, it is confirmatory; with reſpect to government, it is creative. It recites very ample and ancient privileges; but with reſpect to municipal authority and internal regulation, it gives us to underſtand that the conſtitution of the borough was entirely defective. All the proviſions made to rectify theſe defects are therefore new: no recital is made of any perſons who before enjoyed any pre-eminence or governing authority within the borough, but it is granted that *hereafter* there ſhall be 12 capital burgeſſes, who are named, not from any former governors, (as would naturally have been expected, had ſuch exiſted) but from among

Charter Car. 1. created them.

among the free burgeſſes. On the other hand, the corporate rights and privileges are left and confirmed to thoſe who then enjoyed them, namely, the body at large, who conſequently muſt then have been in the enjoyment of the right of election, ſince there was no ſelect deſcription of perſons exiſting by whom it could be exerciſed. In the preſent age indeed, and for ſeveral centuries back, the uniform practice has been to mark out by charter, the internal form of government within the corporation, and to eſtabliſh different orders and degrees among the members of it. But in ancient times it frequently happened that no ſuch proviſion was made, all the corporators being left upon an equal footing with each other; of which ſome inſtances ſtill remain; but in general, they have found it convenient to introduce a ſyſtem of ſubordination among themſelves by their own bye-laws, where their charters are ſilent upon the ſubject. For any thing that appears, prior to the charter of Charles, the members of the corporation of Malmeſbury were all equal among themſelves. Even the diſtinction of

Alderman. alderman affords no ground to preſume the contrary; for he is not named in the earlier charters, and it is rather to be inferred that he was an officer conſtituted from among his equals, to preſerve order among them, and manage their concerns, than that he formed a diſtinct and ſuperior claſs, or integral part of the corporation [q].

Chr of W. 3. It will be ſaid, that the charter of W. 3. recites the enjoyment of certain eſtates by the capital burgeſſes from time immemorial; but it is an extraordinary thing, if that recital were true, that the charter of Charles ſhould not once mention the name of a capital burgeſs, or allude in the moſt diſtant manner to any ſimilar deſcription of perſons; from which, and from the events which appear to have taken place about the ſame time, and which will be preſently obſerved upon, it is much to be ſuſpected that this recital was introduced to ſerve particular purpoſes, and to ſupport an uſurpation which was then in great danger of being put an end to.

[q] V. Spelman, *voc.* Alderman.

Secondly,

Secondly, it is to be conſidered, what light the returns to parliament before the charter afford as to the perſons by whom they were made. It has been obſerved, that the early grants are made to the burgeſſes generally; the charter of Charles the Firſt is alſo granted to the whole body. Now the returns both before and long after that charter are made by the alderman and burgeſſes, and in the name of the community, or of the whole body: to whom therefore, by any rule of conſtruction can the word burgeſſes be applied, but to the ſame perſons who under that name received the charters from Athelſtan, from Richard 2., from H. 4., from Car. 1.; and who to this day, are in the enjoyment of the privileges granted and confirmed by thoſe charters? So that even if a ſelect body could be ſhewn to have exiſted prior to the charter of Charles, to whom by poſſibility the elective franchiſe might have belonged, ſtill, the language of the returns expounded by the charters, and by the actual enjoyment under them, would ſufficiently ſhew that in point of fact the ſelect body did not elect the members, but the corporators at large. In addition to which it may be obſerved, that although the ſelect body have been proved ſince their creation to have made uſe of a particular ſeal, in matters which concern themſelves only, yet the returns have from the firſt, even to the preſent time, been ſigned with the public, corporate ſeal of the borough. Returns.

Such is the argument to be drawn from the general form of the earlier returns; there are however two or three particular returns, which furniſh ſtrong obſervations upon this ſubject.

The return of 33 H. 6. being ſigned by more than 12 names, could not poſſibly have been made by the ſelect number. 33 H. 6.

In the 1ſt and 2d of Philip and Mary it is made by the burgeſſes only; which ſhews that the alderman was not at that time conſidered as an integral part of the corporation; and that is further proved by the return of 3 Car. 1. where the alderman is expreſsly ſtated to have ſet his name *as a* 1 & 2. P. & M.

burgeſs, and by the conſent of the burgeſſes to have affixed the ſeal of the borough.

Time of the uſurpation, by the ſelect body.

It is curious to obſerve, that although the ſelect body was created 11 Car. 1. it did not, if we may judge by the language of the returns, aſſume the exerciſe of the elective franchiſe, till immediately after the reſtoration. Indeed that time was peculiarly favorable to ſuch an uſurpation. The plan of increaſing the power of the crown by the poſſeſſion of an abſolute authority over the governing part of all corporations was already formed; and Dr. Brady was probably even then contributing to the ultimate object of that plan, by endeavouring to ſhew that the right of voting at elections properly belonged to the governing part, and not to the corporators at large. It is apparent however by the alteration in the form of the return, that ſome change muſt at that time have taken place; and it is alſo apparent, from the uſe of the adjective word, *capital*, upon that occaſion, that the word burgeſs, ſimply, was never uſed to expreſs one of a ſelect body.

Prince of Orange's letter.

But the return to the Prince of Orange's letter is deciſive. It is a certificate of the ancient uſage, made, not by the perſons only whoſe ſucceſſors now claim the right, but by the very parties who oppoſe them, viz. the ſelect body, who joined in the return. And that this was not done by neglect, or careleſſneſs, ariſing from the general exultation of all ranks, and from the confuſion that might have prevailed at that time, is proved by a ſecond return exactly ſimilar, made ſoon after, for the purpoſe of ſupplying a particular vacancy. This evidence derives additional ſtrength from conſidering that the general body had, before that time, aſſerted their right in parliament, in 1685.

In April 1690 the return was again made by the general body; and although the candidates in the other intereſt petitioned againſt it, the ſitting members appear to have retained their ſeats, for in the next year a new writ is ordered for the borough in the room of one of them who had died. In 1696 Mr. Wharton was again returned; it may be preſumed he was re-elected by the ſame perſons who had

Quære.

formerly ſupported him, and not by thoſe who had petitioned againſt him; ſo that within the laſt hundred years there appears to have been three at leaſt, and moſt probably, four inſtances, in which the right now contended for by the petitioners has been actually exerciſed; in two of which it has alſo been acknowledged and authenticated in the moſt public and ſolemn manner.

To the agreements in 1699 and 1722 can be allowed but little weight, againſt this evidence. They were made by perſons having an equal intereſt in excluding the corporators and defending the right of the ſelect body, becauſe each candidate thought he had a majority of the latter. As the corporators at large were no parties to either of theſe agreements, it is not juſt that their rights ſhould be concluded, or affected by them. In the caſe of Pontefract, though the right of election had been decided by the Houſe of Commons to belong to the inhabitants, it was twice agreed by contending candidates to belong to the burgage-tenants; and the uſage, as far back as could be traced, was conſiſtent with the agreements, and repugnant to the determination of the Houſe. This inſtance is only cited to ſhew how little reliance ſhould be placed on agreements by candidates, who may find it mutually convenient to compromiſe the rights of the real electors.

Agreement.

Pontefract.

Upon this part of the caſe therefore it is ſubmitted, that there does not appear to have been a ſelect body in the borough of Malmeſbury before the charter of Charles the Firſt; that if ſuch a body did exiſt, they did not make the returns of members to Parliament; that on the contrary, the corporators at large made the returns uniformly, from the 26 Edw. 1. down to the reſtoration; and in at leaſt three inſtances, even ſince that time; on all which grounds it follows, that the right ſtill belongs to the corporators at large, and that the petitioners, being choſen by a majority of them, ought to ſit.

But further, ſhould the committee be of opinion that the right belongs to a ſelect body, it is evident that the ſelect body includes the aſſiſtants as well as the capital burgeſſes.

2. The aſſiſtants are part of the ſelect body.

For both theſe deſcriptions of perſons are created by the charter of Charles; they are named by him out of the free burgeſſes, and are appointed for the ſame purpoſes, namely to counſel and aſſiſt the alderman in all things relating to the borough. They compoſe a part of the governing body in the corporation. Upon whatever footing therefore the right of the capital burgeſſes ſtands, that of the aſſiſtants reſts upon the ſame; and the petitioner being elected by a majority of them, in this view of the caſe alſo, he is entitled to the ſeat.

Argument for the ſitting member.

The counſel for the ſitting member, in their anſwer to theſe arguments, inſiſted that the rules to which the petitioner had reſorted in order to diſcover the original right of election in this borough, were fallacious and uncertain; that in point of evidence attempted, on either ſide, to be produced from ancient times, the caſe reſted in preſumption only; but that the preſumption in favor of their client, was confirmed and eſtabliſhed by the uſage of later times, on which they mainly relied, and which they contended to be in all caſes the ſafeſt, but in this, the only guide.

Uſage.

Early returns.

The language of the early returns throws but little light upon the ſubject; it is admitted that all the corporators are burgeſſes; but the queſtion for the committee to decide is, whether all the burgeſſes exerciſed the right, or whether the exerciſe of it was committed to the particular authority of ſome ſelect branch of the corporation? In either caſe the electors were properly deſcribed under the general appellation of burgeſſes.

It is aſked, who made the returns in the reign of Edw. 1? the anſwer is not eaſily given; but it ſhould be required of the petitioners, who ſeek to deſtroy a right which has been eſtabliſhed by ſo long a poſſeſſion. The difficulty of giving an anſwer to it, ariſes, in the firſt place, from the eſtimation in which the power of chooſing members was anciently held. It was not then a franchiſe, but a burthen; only endured, if it could not be avoided. He, therefore, who ſearches for it as a matter of right and privilege in times when it

it did not exiſt as a right or privilege, muſt not be diſappointed if his ſearch is fruitleſs. Another difficulty, equally inſurmountable, ariſes from the extreme careleſſneſs of the ſheriffs in making their returns. Previous to the 26 Edw. 1. it is ſaid that the returns were made for the county and for all the boroughs within it, at a county court holden by the ſheriff, attended by deputies from the different boroughs, wherein neither the electors nor the repreſentatives of particular places are diſtinguiſhed: from that period to the 33 H. 6. (in the caſe of the borough of Malmeſbury) the returns are made in a ſchedule, naming indeed the members returned, but ſtill ſilent as to the particular perſons who elected them. The return of H. 6. is relied upon by the petitioners; but to draw any authority from that piece of evidence, they ſhould have ſhewn, that at the period when it was made, that which was before moſt uncertain and irregular, had now become ſo accurate and determined as to afford a certain light to all ſucceeding times, as to the perſons engaged in theſe proceedings: whereas on the contrary, we find in the next return, in Edw. 4. that every thing had returned to the ſame ſtate of uncertainty as before; the ſt. 23 H. 6. having had no further attention paid to it than to be obeyed on one occaſion only, namely, at the election which took place immediately after the making of it. But allowing all the authority to this return which is demanded, it does not prove, in any manner, the point contended for; inaſmuch as it might ſtill be made by a ſelect number; and it will preſently be ſhewn that it is not neceſſary for the ſitting members to prove that the ſelect or governing body has always paſſed by the ſame name, poſſeſſed the ſame powers, or conſiſted of the ſame numbers.

33 H. 6.

Select body incidentally altered.

It is ſaid, the ancient returns are made for the community of the borough: but that phraſe is generally made uſe of in all returns; and is merely the echo of the writ, which requires the members to be returned, for the purpoſe of conſenting 'for the whole community.' Beſides, by whomſoever a member of Parliament is elected, when

Pro communitate.

elected, he repreſents the whole community of the place for which he is returned. This principle of virtual repreſentation pervades our conſtitution, and is too familiar to require to be illuſtrated by any particular inſtances.

Returns to Car. 1.

The returns therefore, down to the time of Charles the Firſt, afford no means of acquiring any preciſe knowledge of the deſcription of perſons by whom the elections were made; their being ſigned in all inſtances except in 33 H. 6. by a number leſs than twelve, affords however, a ſtrong argument that they were conſtantly made by the ſelect body, viz. by the capital burgeſſes, or by other perſons anſwering to the ſame deſcription.

Charter Car. 1.

But it is contended, that it appears from the very words of the charter of Charles, that the ſelect body was then created. The ſame argument would apply to the alderman; an officer that beyond all doubt exiſted long before; yet it is ſaid of him too, that hereafter there ſhall be an alderman; and the modern alderman is named from among the free burgeſſes. The circumſtance of there having been an alderman before the charter, implies a form of government ſubſiſting at that time; that it was weak and defective is teſtified by the charter itſelf; but it is certain, that the diſtinction of landholders and commoners was known in the borough from time immemorial, and probably ſome further diſtinction of orders and degrees then ſubſiſted; for it is not eaſy to ſuppoſe that they were deſtitute of ſuch officers and governors, and of ſuch a ſyſtem of municipal œconomy as is generally ſeen to exiſt in all corporations by preſcription; affording a model upon which ſubſequent charters have in moſt inſtances framed the conſtitution of the borough. And admitting that the form of government were incidentally altered by the charter of King Charles, and that a ſelect body were thereby created, differing in ſome reſpects, as in name, in power, or even in number, from that which exiſted before; ſtill, it can never be contended, that the right of election which before the charter had exiſted in the ſelect body, would not continue to belong to the ſelect body created by the charter; for upon whom, after

after the corporation had accepted the charter, could it otherwiſe devolve?

The returns long after the charter continue to be the ſame as they were before it; it is not till the reign of Charles the Second that the term 'capital burgeſſes' is introduced in them; for the purpoſe, probably, of aſcertaining more accurately the deſcription of perſons who made them; for it is to be obſerved, that the ſame ſeal is uſed after that alteration had taken place; now if that alteration had been meant to cover, or to eſtabliſh an uſurpation, is it not moſt probable that they would have changed the ſeal likewiſe, and have affixed that which is proved to belong ſolely to the mayor and capital burgeſſes? It has been ſaid, that the uſe of the public ſeal proves the return to be the act of the body at large; it is ſubmitted, that it proves no more than (what is very evident) that the return is a public act, and made on behalf of the body at large, by whomſoever the power of election is exerciſed. But the true origin of the private ſeal appears from the charter of William 3, which conſtitutes the mayor and capital burgeſſes a corporation, within the larger corporation, and not only gives them certain powers, and veſts certain lands in them, but (what is extremely material) recites their immemorial exiſtence, and their enjoyment of thoſe ſame lands. The evidence both as to the preſent occupation of the lands, and traditionally, the occupation of them by the predeceſſors of the preſent ſelect body, confirms the recital of the laſt-mentioned charter in this reſpect.

Returns from Car. 2.

Seals.

Charter of W. 3.

To go back to the returns which followed the period of the reſtoration, we find the 13 electors in 1674 deſcribing themſelves again, as formerly, by the name of the alderman, and "*all* the burgeſſes," ſo that there can be no doubt that this word was uſed to ſignify the ſelect body.

25 Car. 2.

The returns in 1688 9 are anomalies. They are as irregular as the other tranſactions of thoſe times, and as the occaſion itſelf which called for them. It is probable, that the ſelect party were deſirous of obtaining the ſignature and concurrence of as many perſons as poſſible, to a tranſ-

Returns 1688-9.

action, for which, or ſome future occaſion they might be called upon to render a very heavy account. But it is remarkable, that even in theſe returns, the corporators at large do not deſcribe themſelves by the title burgeſſes, but by the individual name of that order to which they reſpectively belong; as "aſſiſtants—landholders—commoners:" and that the return in 1691, to ſupply the place of Sir J. Long, was made by the alderman and burgeſſes, "with the whole aſſent and conſent of the capital burgeſſes." The two petitions, one againſt the limited right in 1685, the other againſt the enlarged right in 1690, having met with the ſame fate, no argument can juſtly be drawn from either.

Later returns. The returns from this time, with one exception only, are made by the capital burgeſſes; and from as far back as memory, or tradition can trace, the elections have in fact been made by them; a circumſtance which of itſelf ſhould turn the ſcale in their favor, if the other ſide have not, indiſputably, ſhewn another right. The agreement in 1699, only ten years after the events had taken place which are ſo much relied upon by the petitioner, ſhew that in thoſe days at leaſt, much weight was not attributed to them. The corporators at large having permitted that agreement, and the ſubſequent agreement in 1722 to paſs over in ſilence, furniſhes the ſtrongeſt evidence againſt them of the futility of their claim.

Agreements.

The committee are therefore to decide, whether the corporators at large, have ſhewn a right ſo clear and indiſputable, as to ſet aſide a preſumption ariſing from long uſage, conſiſtent with all the evidence in the cauſe, with the language of the returns, and with two agreements before the Houſe of Commons. It is ſubmitted not only that they have failed in giving ſuch proof, but that even they have not furniſhed grounds for a probability, or plauſible conjecture in their favor.

Aſſiſtants. The ſame arguments drawn from uſage, from the agreements, and from the returns, exclude alſo the aſſiſtants; they are no part of the governing body, which is ſolely compoſed

compoſed of the alderman and the capital burgeſſes, according to the expreſs proviſions of the charters, and according to the practice, which has been proved to prevail from time immemorial.

The committee reported, 10 May, that the right ſtated by the petitioner was not the right, and that the right ſtated by the ſitting member was the right of election in this borough; and that the ſitting member was duly elected. Deciſion and report.

The teſtimony of one Hanks, a landholder, who was called as a witneſs by the petitioner, in ſupport of the right ſtated by him, was, after argument, rejected by the committee. Incidental point. Interested witneſs.

For an account of the petition of appeal which was preſented againſt the determination of the ſecond committee, ſee *ante*, vol. 1. p. xxviii. Introd. Petition of appeal.

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